Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

VENTURA GROUP VENTURES, INC.,
a California corporation,
Petitioner,

v.

VENTURA PORT DISTRICT; THE BOARD OF PORT COMMISSIONERS OF VENTURA PORT DISTRICT; and THE BOARD OF SUPERVISORS OF VENTURA COUNTY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Is the State of California prohibited by the Due Process Clause of the Fourteenth Amendment from enforcing any state law that purports to deprive the state and federal judiciary of their historically accepted judicial power to enforce a final, validly entered, money judgment against a local governmental entity by mandating that taxes be levied to pay it, when that is the only means available to satisfy the judgment?

2. Under a republican form of state government as envisioned by Article IV Section 4, do the People of California, the California Legislature or the California Supreme Court have the governmental power to restrict the state and federal judiciary's power to enforce a judgment against a local governmental entity via a court mandated tax levy, by requiring that local taxpayer approval first be obtained?

3. If California has the governmental power under the United States Constitution to make such laws, and as a result of the application of such laws a judgment against a local entity is discharged under Chapter 9 for less than what is owed, does the Fourteenth Amendment require the State to pay the judgment creditor "just compensation" for the full amount of the local entity's debt that was taken from the judgment creditor by operation of such a state law?

4. Would the answer to either issue 1, 2, or 3 be any different if the money judgment imposed liability on the local entity for the deliberate taking of a private party's interest in a public improvement project in bad faith and without providing its joint venturer "just compensation" for what was taken?

5. Did the Ninth Circuit have a duty under Article III, in the declaratory relief action pending before it, to address these issues of federal law after the California Supreme Court purported to resolve them on the merits in its response to the Ninth Circuit's certified questions of state law? Or, must they be resolved by this Court under its exclusive appellate jurisdiction over final decisions of a state's highest court (28 U.S.C. § 1257), in order to assure that the California Supreme Court is not the final arbiter of important issues under the federal constitution?

PARTIES TO THE PROCEEDINGS

Petitioner

Ventura Group Ventures, Inc., a California corporation (hereinafter "VGV")

Respondents

Ventura Port District (hereinafter "District"), The Board of Port Commissioners of Ventura Port District; and Board of Supervisors of Ventura County.

Other Parties

LYW Ventura Harborview Limited Partnership; Great Western Bank; Federal Deposit Insurance Corporation, as Receiver for the Merchants Bank, Kansas City Missouri; Ventura Port District Public Facilities Corporation; Ventura Port District Public Improvement Corporation; Lagerlof, Senecal, Drescher & Swift and Thomas S. Bunn, III, were parties to the proceedings below and have no interest in the outcome of the petition.

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Ventura Group Ventures, Inc. ("VGV") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court following the California Supreme Court's answers to certified questions of state law.

OPINIONS BELOW

The opinion of the District Court in the instant dispute was unreported and is reproduced in App. J at 60a-73a. The opinion of the Ninth Circuit Court of Appeals certifying questions of state law to the California Supreme Court is reported at 179 F.3d 840 (9th Cir. 1999) and is reproduced in App. G at 38a-52a. The opinion of the California Supreme Court answering those questions is reported at 24 Cal.4th 1089 (2001) and is reproduced in App. E at 10a-35a. The Memorandum Decision of the Ninth Circuit Court of Appeals affirming the judgment of the district court is unreported and is reproduced in App. B at 3a-6a.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on August 29, 2001. A timely petition for rehearing was denied by that court on September 24, 2001. App. A at 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1). This Court has jurisdiction to review a final decision of the California Supreme Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution provides, among other things that "[t]he judicial Power of the

United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

Article IV, Section 4 of the United States Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence. U.S. Const. art. IV, § 4.

The Fifth Amendment to the United States Constitution provides, among other things, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, among other things, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. The State Court Compensatory Award in VGV's Favor.

The circumstances leading to the state court judgment against the District are set forth in the published opinion of the California Court of Appeal reported at *Ocean Services Corp. v. Ventura Port District*, 15 Cal.App. 4th 1762, 1781; 19 Cal.Rptr.2d 750 (Cal. Ct. App. 1993) and is reproduced

in App. K at 74a-98a. That decision established that the adoption of Proposition 13 by popular vote of the California electorate in 1978 did not affect the District's Board of Port Commissioners' authority to contract for the construction of the Ventura Harbor Village, as long as the necessary funds were raised by some means other than taxes. It is also undisputed that Ocean Services Corporation ("OSC") completed this $23 million project without one penny of property tax dollars and had it not been evicted in bad faith in 1987, OSC would still be enjoying the fruits of its 50-year lease today.

The underlying state litigation began in 1984, upon the District's refusal to abide by its promise to renegotiate OSC's leasehold payments to compensate it for losses it sustained as a result of construction delays that were entirely the District's responsibility. In 1987, after OSC was evicted and the District had taken all of OSC's equity interest in this joint development project, OSC was allowed to amend its complaint against the District to seek just compensation for the loss of its valuable 50-year leasehold estate. In 1990, OSC's Chapter 7 Trustee, lacking funds to prosecute that action, sold OSC's claims against the District to VGV, a corporation formed by former OSC shareholders, in exchange for a cash payment from VGV and its promise to share a percentage of any net recovery with the Chapter 7 estate.

On August 19, 1993, the substantive merit of VGV's state law breach of implied covenant claim against the District was finally resolved in state court. On that day, the California Supreme Court denied review of the California Court of Appeal opinion that had affirmed the 1990 holding of a unanimous state court jury that the District did *not* have discretion "to disavow responsibility for the covenant-related losses, change the terms of the lease, issue default notices in

bad faith, [and] blight the project with a sand berm." (*Ocean Services Corp. v. Ventura Port District* 15 Cal.App.4th 1762, 1781; 19 Cal.Rptr.2d 750 (Cal. Ct. App. 1993).) (App. K at 97a.) As the Court of Appeal stressed when it affirmed the $15.6 million dollar compensatory award in OSC's favor to hold that a local public entity had discretion to behave in the fashion the District did, would be tantamount to a "license to steal" and absolve the District "from liability for conduct which would make the very contract itself and the security mentioned therein wholly valueless." (*Ocean Services Corp. v. Ventura Port District*, *supra*, 15 Cal.App.4th at 1781.) (App. K at 97a.)

2. VGV's Efforts in the State and Federal Courts to Enforce That Award.

With that final judgment in hand, VGV has spent the last eight years seeking to enforce it against the District under the state law governing the enforcement of money judgments against local governmental entities in California contained in California *Government Code*, §§ 970 to 971. Those efforts have taken VGV from state court (where it originally sought a declaratory judgment as to the effect, if any, Proposition 13 had on the District's obligations) to bankruptcy court (by virtue of the District's petition under Chapter 9) back to state court (upon securing relief from stay) then to federal district court (after the FDIC removed the state case to federal court) where the district court entered a judgment declaring that Proposition 13 prohibited a tax levy to pay the judgment. (App. J at 65a.) The Bankruptcy Court then entered an order providing that the District's remaining liability under the judgment would not be discharged if VGV prevailed in the Ninth Circuit on its pending "tax appeal" from the district court's judgment. (App. I at 57a-59a. See, also, App. H at

53a-55a.)

After the state and federal issues were briefed and argued before the Ninth Circuit, the Ninth Circuit observed that:

> "Nonetheless, we recognize that a California court has barred application of Article XIII A when an inverse condemnation judgment was at issue. See *F & L Farm Co. v. City Council*, 65 Cal.App.4th 1345, 77 Cal.Rptr. 2d 360 (Cal. Ct. App. 1998). VGV argues that F & L Farm should be extended to bar the enforcement of Article XIII.A in this case to permit the County to satisfy its judgment by levying additional property taxes. Related to this argument, VGV argues that Article XVI's involuntary obligation exception, discussed in F & L Farm, should be applied in the Article XIII A context. See, generally, *County of Los Angeles v. Bryam*, 36 Cal.2d 694, 227 P.2d 4 (Cal. 1951) (in bank); *Arthur v. City of Petaluma*, 175 Cal. 216, 165 P. 698 (Cal. 1917); *Lewis v. Widber*, 99 Cal. 412, 33 P. 1128 (Cal. 1893). At this time, the California courts have not extended the involuntary obligation exception of Article XVI in this manner." (App. G at 49a-50a.)

Accordingly, the Ninth Circuit, before reaching the issues VGV raised under the United States Constitution, certified two questions of state law to the California Supreme Court:

1. Does Article XIII.A of the

California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes in excess of the one percent limit, pursuant to California *Harbors and Navigation* Code § 6361 to pay a money judgment as required by California *Government Code* §§ 970-971?

2. Does a port district, created pursuant to California *Harbors and Navigation Code* § 6210, have independent authority to impose assessments under California *Harbors and Navigation Code* § 6365(d)(2) in order to raise the funds needed to satisfy a judgment obtained against it? (App. G at 39a.)

On February 15, 2001 (almost 8 years after it had denied review of the $15.6 million dollar compensatory award in VGV's favor) the California Supreme Court, in a published opinion styled *Ventura Group Ventures, Inc. v. Ventura Port District, et al.* 24 Cal.4th 1089 (Cal. 2001), (App. E at 10a-52a), purported to answer those questions. First, and some what unexpendedly, it concluded that it need not consider whether "whether an exception for judgments resulting from nondiscretionary acts should be read into Article XIII A" (App. E at 22a-23a) because the state statutes (Rev. & Tax. Code, §§ 2205, 2271; Gov. Code §§ 970.8, 971) enacted before Proposition 13 provided that a judgment arising from a "discretionary act," could not be enforced even with "voter approval."

As it explained, the judgment against the District "resulted from two discretionary acts: The District's decision to enter into a ground lease with OSC and the District's subsequent decision to violate the implied covenant of good

faith and fair dealing." (Emphasis added.) (App. E at 22a.) The California Supreme Court held that under state law, this was a judgment arising from a "discretionary act" and as a result, the "judgment is not covered by the statutory exemption for '[c]osts mandated by the courts.' (Rev. & Tax. Code §§ 2205, 2271; Gov. Code §§ 970.8, 971.)" (App. E at 23a.)

But what the California Supreme Court fails to mention or discuss is that these very statutes also provided in the case of a judgment arising from a "discretionary act" that Ventura County's Board of Supervisors had a mandatory duty to levy a special property tax annually at the 10 cents per $100 of assessed value rate set forth in the District's "enabling statutes" (Cal. Harb. & Nav. Code §§ 6361 and 6362) to pay such a judgment. By ignoring this, the California Supreme Court avoids providing a straight answer as to whether Article XIII A's voter approval requirement prohibited the enforcement of the judgment at that rate.

The California Supreme Court's failure to discuss its own "involuntary indebtedness" rule in connection with its "discretionary act" holding is another clear example of its efforts to avoid a good faith consideration of the state law issues certified to it. "The standard used in [Government Code, § 971] subdivision (a)--which distinguishes between judgments that result from a discretionary act and those that do not--is drawn from [the California courts'] cases *interpreting constitutional limits on liabilities or indebtedness* . . ." (Emphasis and bracketed material added.) (15 *Cal. Law Revision Comm. Rep.* (1980) p. 1257.) To deem the judgment against the District "discretionary" without any discussion of the debt limit cases cannot be explained or justified.

Its failure to consider this settled, 100 year old, state rule[1] when it uses this case as a vehicle to belatedly disapprove the Court of Appeal decision in *F&L Farm Company v. City Council of the City of Lindsay,* 65 Cal.App.4th 1345, 77 Cal.Rptr.2d 360 (Cal. Ct. App. 1998)[2] is also remarkable. In *F&L Farm*, the Court of Appeal citing that well settled rule had held that the "voter approval" requirements contained Articles XIII.A, XIII.C and XIII.D of the California Constitution (adopted as Proposition 13 in 1978 and Proposition 218 in 1996) did not annul the power the California state courts previously possessed to enforce judgments arising from "non discretionary acts", such as an inverse condemnation judgment, by compelling the entity to

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[1] Just three years before its decision in the case at bar, the California Supreme Court said "[w]e have long held that the [voter approval] debt limitation in section 18 *only* applies to discretionary debt, not to obligations imposed by law." *Rider v. City of San Diego* 18 Cal.4th 1038, 1045; 959 P.2d 347, 353; 77 Cal.Rptr.3d 189, 195 (Cal. 1998) (emphasis in original) (bracketed material added for clarity). Never before had the California Supreme Court held that a state constitutional provision requiring local "voter approval" can be applied to prohibit the state judiciary from enforcing involuntary obligations imposed on local government by state or federal law. This settled state rule can be traced back to 1860, (well before the Fifth Amendment's Taking Clause was applied to the states under the Fourteenth Amendment), when the California Supreme Court held in a case remarkably similar to the one at bar that local government "*cannot appropriate to [its] own use the property of others, and screen [itself] from responsibility upon any pretense of excessive indebtedness*." *McCracken v. City of San Francisco* 16 Cal. 591, 631-632 (Cal. 1860).

[2] The California Supreme Court had three years previously denied the City of Lindsay's Petition for Review of that Court of Appeal decision on October 21, 1998.

levy taxes or assessments to pay them. By disapproving that holding, the California Supreme Court (although reluctant to say so directly) clearly holds that the "voter approval" requirements contained in Articles XIII.A, XIII.C and XIII.D of the California Constitution annulled the power the judiciary previously possessed to enforce any type of judgment regardless of whether it was deemed to arise from a discretionary or a non-discretionary act. (App. E at 26a-28a.)

Of course, neither the Ninth Circuit nor this Court have the power to dictate California law to the California Supreme Court. The California Supreme Court is free to ignore settled state rules in reaching its conclusion that state law prohibits any effective judicial enforcement of a judgment awarding compensatory damages for a deliberate taking of private property without compensation. But the California Supreme Court did not stop there. It goes on to hold in response to the Ninth Circuit's certified question of state law, that VGV's assertion that such a state law tramples on VGV's rights under the United States Constitution lacked merit. (App. E at 23a-25a.) And, it proceeds to announce that a future federal "taking" claim against the state itself would also lack merit because Congress (by making judgments against a local entity subject to discharge under Chapter 9) has already decided that less than full compensation is constitutionally permissible under the circumstances. (App. E at 26a.) VGV's Petition for Rehearing in the California Supreme Court questioning its authority to base its decision on federal bankruptcy law and requesting, among other things, that it provide a non-evasive response to the questions of state law that had been certified to it (App. M at 116a-140a) was denied without comment on March 28, 2001. (App. D at 9a.)

Upon receipt of the California Supreme Court's opinion, the Ninth Circuit ordered the parties to "submit simultaneous briefs of no more than twenty-five pages by April 30, 2001, apprising this Court on the effect of the California Supreme Court's opinion in *Ventura Group Ventures, Inc. v. Ventura Port District.*, 24 Cal.4th 1089, 16 P.3d 717 (Cal. 2000) on the remaining issues in this appeal." (App. C at 7a-8a.) In its Supplemental Brief VGV, urged the Ninth Circuit to independently consider the federal "due process" and "taking" issues the California Supreme Court had undertaken to resolve on the merits based on Chapter 9 and to consider the merits of VGV's challenge based on the Guarantee Clause. (App. N at 141a-165a.) On August 29, 2001, the Ninth Circuit entered its Memorandum Decision holding that VGV's Guarantee Clause did not present an Article III case or controversy and that it could not consider the merit of VGV's due process argument saying that it had been waived. (App. B at 6a.) It then, without mention of the federal "taking" and "just compensation" issues, affirmed the judgment of the District Court declaring that Proposition 13 prohibited a levy of taxes to pay this judgment based on the California Supreme Court's state law answers. (App. B at 6a.)

VGV petitioned the Ninth Circuit for rehearing on September 12, 2001 raising three points: (1) the Ninth Circuit's holding on the Guarantee Clause challenge was in direct conflict with this Court's decisions on that subject (App. L at 102a-108a); (2) VGV's due process challenge had merit and the Ninth Circuit was wrong in saying it had been waived (App. L at 108a-110a); and (3) the Ninth Circuit had Article III jurisdiction and a duty to respond to the California Supreme Court's holding on these federal issues as well as its self serving and unsolicited declaration that California cannot be held liable for taking VGV's judgment if the judgment

against the District is discharged under Chapter 9. (App. L at 110a-115a.) That petition was denied on September 24, 2001. (App. A at 1a-2a.)

REASONS FOR GRANTING WRIT

1. Certiorari is Warranted To Establish the Lower Federal Courts Duty Under Article III to Address Important Issues of Federal Law a State's Highest Court Has Purported to Decide on the Merits in Its Response to Certified Questions of State Law.

The California Supreme Court was careful not go so far as to publicly say that the People of California or the California Legislature, had deprived the state judiciary of the power to decide the merits of OSC's claims against the District and of its power to enter the $15.6 million dollar judgment awarding OSC "just compensation" after the District had taken its 50-year leasehold estate and had refused to pay OSC a single penny of compensation for it. But the practical effect of its holding, and the Ninth Circuit's refusal to consider it, is far more devastating to VGV's constitutional rights.

By holding that Propositions 13 and 218 (or state statutes) prohibit the state and federal courts from enforcing such judgments (by mandating that taxes or assessments be levied to pay them) the California Supreme Court has announced that under state law the only possible way that a judgment awarding "just compensation" can be enforced against local government in California is if two thirds of the local electorate affirmatively vote to abide by the Fifth and

Fourteenth Amendments of the United States Constitution.

By its holding, that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment," the California Supreme Court purports to immunize the state from the payment of "just compensation" when state law is applied to "discharge" local government's debt for less than the full amount of just compensation a property owner was awarded.

This case presents an important issue regarding the Ninth Circuit's duty under Article III to consider the California Supreme Court's holdings on issues of federal law in the context of the declaratory relief action pending before it. The California Supreme Court was asked to decide whether the People of California or the California Legislature intended to prohibit local entities from levying taxes or special assessments to pay obligations imposed by law. Had the California Supreme Court candidly said in response, that yes the voter initiatives or state statutes make it unmistakably clear that a levy of tax to pay any judgment even those awarding "just compensation" mandated by the United States Constitution against a local governmental entity were prohibited, that answer would unquestionably be binding on the Ninth Circuit.

Then, it would have been the Ninth Circuit's job to decide whether the People of California and/or the California Legislature have political power to do this in a "republican form of state government" and whether a state law that deprives a person of ordinary judicial process to enforce a judgment against a local governmental entity deprives the judgment creditor of property without due process of law in violation of the United States Constitution.

The Ninth Circuit's unreported Memorandum Decision does not consider the merits of either of these issues.

As discussed in Section 3, infra, the Ninth Circuit holds in disregard of this Courts decisions *New York v. United States*, 505 U.S. 144, 184, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) ("*New York*") and *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 146, 32 S.Ct. 224, 56 L.Ed. 377 (1912) ("*Pacific States*") that VGV's Guarantee Clause challenge presented a non justiciable "political question." As discussed in Section 4, infra, it refuses to consider the merits of the VGV's federal procedural Due Process challenge under the standard this Court established in *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446, 1451 (2001) claiming it had been waived.

But, at least as to these federal issues the Ninth Circuit gives some reason, albeit erroneous, for not considering the merits of these federal claims. It gives no explanation for its refusal to consider the California Supreme Court's remarkable holding that under federal law the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking [by the State of California] in violation of the Fifth Amendment." (Bracketed material added for clarity.) (App. E at 26a.) Although, upon failing to sustain VGV's Due Process and Guarantee Clause challenges, the Ninth Circuit had the duty to consider this equally important issue of federal law.

In *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 122, 95 S.Ct. 335, 348, 42 L.Ed.2d 320 (1974), all members of this Court agreed that the reorganization act would be unconstitutional if it allowed the federal government to take a stock holder or creditor's interest in a railroad's property without payment of "just compensation"as required

by the Fifth Amendment. The reorganization act was found to be constitutional by the majority only because they concluded that Reorganization Act did not repeal the Tucker Act by implication. Since the Tucker Act was not repealed and would provide a remedy to recover the balance of just compensation from the government if less than "just compensation" was received in the bankruptcy proceeding under the reorganization act, the reorganization act was was constitutional.

But, here the California Supreme Court has found that Proposition 13 and 218 did repeal the state statutes governing the enforcement of judgments against local governmental entities. Although, the California Supreme Court's conclusion that this is what was intended by these state initiatives was binding on the Ninth Circuit, its subsequent holding that the State of California cannot be held liable under federal law for "just compensation" if a judgment against a local entity is discharged under Chapter 9 for less than full compensation was not binding. The Ninth Circuit should have addressed that issue of federal law because that holding by the California Supreme Court is directly contrary to this Court's reasoning in the *Regional Railroad Reorganization Act Cases*, *supra*.

The Ninth Circuit also had a duty to respond to the California Supreme Court's suggestion that Congress by enacting Chapter 9 intended that all local entities in the State of California would have an absolute federal right to have any burdensome state or federal judgment discharged under Chapter 9, unless the local taxpayers were willing to approve a levy of taxes to pay it.

In *Missouri v. Jenkins,* 495 U.S. 33, 55, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990) this Court held that a federal

court's "order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court." The California Supreme Court's holding purports to take this power from not only the state but also the federal judiciary. As this Court made equally clear in *United States v. Bekins*, 304 U.S. 27, 53-54, 58 S.Ct. 811, 82 L.Ed. 1137 (1938), Chapter 9 was created to provide local government relief when "the owners of property within the boundaries of the district could not pay adequate assessments [and] the power of taxation was useless." The California Supreme Court incorrectly construes Chapter 9 to allow the State of California to deny a private party payment of a just debt which local taxpayers can, but simply do not want to pay.

When the California Supreme Court, in disregard of the settled principles of judicial restraint (in response to Certified Questions of state law) lectures the federal courts on " the protections afforded [local governmental entities] under Chapter 9 of the Bankruptcy Code" and makes sweeping and factually inaccurate statements[3] such as the "discharge of the

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[3] The Bankruptcy Court's amended order did not discharge the District's remaining liability under the judgment against it. That order provided that the judgment was not discharged if the Ninth Circuit resolved the Proposition 13 issues in VGV's favor under either state or federal law. (App. I at 57a-59a.) As to the issues of federal law the Ninth Circuit, admittedly retained jurisdiction to decide whether Propositions 13 was: "incompatible with the United States Constitution's guarantee of a republican form of government and/or does an application of Article XIII A that effectively allows a one-third minority of the local electorate to decide whether a judgment issued by the state judiciary enforcing state laws will or will not be paid also violate the separation of powers doctrine and deprive the judgment creditor of property

District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment . . ." (App. E at 26a.) VGV submits that the Ninth Circuit had the duty to consider the merit of the statements, if only because all Article III courts have "judicial power and ever-present duty whenever it becomes necessary, in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power." *Pacific States*, *supra*, 223 U.S. at 150.

VGV can only speculate that the Ninth Circuit's refusal to consider this issue was based on a misunderstanding of this Courts landmark decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City* 473 U.S. 172, 190, 194 (1985). Under *Williamson County* two things are clear. First, the federal courts cannot enjoin a state from taking private property for public use . The federal courts' Article III jurisdiction is limited to awarding just compensation for what was taken. Second, the federal courts lack jurisdiction to consider a federal "just compensation" claim until after the owner has sought just compensation under state law and had been denied just compensation in state court.

The Ninth Circuit may have thought that it lacked jurisdiction to consider the merits of federal "just compensation" claim against the State of California under *Williamson County* until after VGV had sought "just compensation" from the state in state court and been denied recovery. It may also have been reluctant to consider this

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without due process of law." (Ninth Circuit Order, App. H at 53a-55a.)

issue because an argument could be made under this Courts decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) that the Eleventh Amendment deprived the Ninth Circuit of jurisdiction to consider the merits of a potential "just compensation" suit against the State of California.

But, neither *Williamson County* nor *Kimel* hold that the California Supreme Court has the power and right to dictate federal law to federal courts in response to certified questions of state law. When the California Supreme Court, acting in its official capacity, purports to declare, in this case, that the State of California cannot be held liable for "just compensation" under federal law, the Ninth Circuit had, not only jurisdiction but a duty under Article III to address that important issue of federal law on the merits.

2. Certiorari Is Also Appropriate To Prevent The California Supreme Court From Being The Final Arbiter of Important Issues of Federal Law.

As VGV pointed out in its Supplemental Brief in the Ninth Circuit:

> "Until the California Supreme Court's decision in this case, everyone agreed that the Fifth and Fourteenth Amendments prohibit a state's electorate, its executive branch, its legislature and its judiciary from forcing a private party "to bear public burdens which, in all fairness, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed 2d 1554, 80 S.Ct. 1563 (1960). (App.

N at 158a.)

For, the reasons already discussed VGV believes the Ninth Circuit had the duty to address the federal "taking" issue in the context of this case. If it did not, this Court must consider it. This Court has the duty to assure "that state courts will not be the final arbiters of important issues under the federal constitution'." *ASARCO Inc. v. Kadish* 490 U.S. 605, 621 (1989).

By grafting Chapter 9 onto the state inverse condemnation remedy against local governmental entities, the California Supreme Court has turned accepted federal taking jurisprudence upside down. If any judgment awarding "just compensation" under state law is avoidable under Chapter 9 at the insistence of one third or less of the local voters it can hardly be said that state law affords a person whose property has been taken a reasonable remedy to secure just compensation. In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997), this Court held that if the compensation remedy afforded by state law will not result in full compensation (as California's modified Chapter 9 remedy will not) the property owner can immediately proceed against the local entity in federal district court. [4] Does this mean that federal

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[4] This is not the only area where the California Supreme Court showed little regard for federal "taking" law. As to assessments a port district was authorized to levy under Cal. Harb. & Nav. Code § 6365 to "satisfy liabilities arising from projects" the California Supreme Court held that such could be levied only where the property taken conferred an identifiable monetary "special benefit" on the property to be assessed. (App. E at 31a-33a) Where under this Court's decisions in a federal taking case "the question is what has the owner lost, not what has the taker

jurisdiction under Article III will now exist under *Williamson County* as soon as a local governmental agency in California has taken property without payment of just compensation?

But it will do injured property owners little good to file their "taking" claims against such entities in federal district court because the California Supreme Court says that if the plaintiff recovers a just compensation award against the offending entity in federal district court, that judgment can itself still be discharged under Chapter 9 merely because local voters will not approve taxes to pay it.

If the California Supreme Court is wrong, and a just compensation claim against the State can be maintained when a state or federal court judgment is subsequently discharged for less than "just compensation", where is that claim to be filed? If it is filed in state court the result is preordained by the California Supreme Court's holding in the case at bar. Whether it could be filed in federal district court in light of the Eleventh Amendment is not clear.

Certiorari should be granted to resolve these issue now, before the California Supreme Court's distorted view of federal law places an unnecessary and unacceptable burden on the federal district courts and the federal bankruptcy courts, not to mention VGV and others similarly situated. Although, this Court's supervisory authority over the state courts is limited, it is properly exercised to correct wrongs of constitutional dimension. *Dickerson v. United States*, 530 U.S. 428, 444, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

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gained." *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725 (1910).

Certiorari is also appropriate to consider whether the restrictions California Supreme Court has placed on the state and federal judiciary's ability to enforce judgments against local California public entities can be tolerated under the Guarantee Clause and whether the procedure it dictates to secure just compensation violates the Due Process Clause. These are two other important federal issues the Ninth Circuit declined to consider. A decision in VGV's favor on either of these points would invalidate these restrictions and make it clear that the District Court can enter a judgment declaring that the District must levy the taxes and assessments needed to pay the existing judgment. A decision on either of these issues would of course eliminate the need to confront, and there would be no need to consider the federal "taking" issues that arise from the California Supreme Court's misapplication of federal bankruptcy law.

3. Certiorari Should Also Be Granted To Consider Whether the California Supreme Court Has Violated the Constitution's Guarantee Clause.

VGV's argument that the payment of state and federal court judgments cannot be made the subject of local voter approval without necessarily violating the Guarantee Clause was rejected on the merits by the California Supreme Court. The California Supreme Court claimed it had rejected this very argument in its 1978 decision in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* 22 Cal.3d 208, 245-246, 149 Cal.Rptr. 239, 583 P.2d 1281 (Cal. 1978) ("*Amador*"). But the fact of the matter is that in *Amador* the proponents of Proposition 13 did not assert, and the California Supreme Court had no occasion to consider, whether Proposition 13 was intended to annul the state judiciary's power to mandate that taxes be levied by local government to

pay involuntary obligations imposed by law. In *Amador* the proponents of Proposition 13 maintained that Proposition 13 was intended to do nothing more than limit the amount of local taxes levied for local discretionary spending.

The Ninth Circuit also avoided confronting this issue. It held, as a matter of federal law, that any challenge to a state law under the Guarantee Clause, including VGV's, presents nothing more than "a nonjusticiable political question." (App. B at 6a.) In support of this sweeping pronouncement it cites only one case, i.e., the Ninth Circuit's recent holding in *Murtishaw v. Woodford*, 255 F. 3d 926 (9th Cir. 2001) which was decided after briefing concluded in the case at bar.

In its Petition for Rehearing (App. L at 102a-108a), VGV urged the Ninth Circuit to revisit this holding, because *Murtishaw's* broad holding was in direct conflict to this Court's holdings in *New York v. United States*, 505 U.S. 144, 184, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) ("*New York*") and*Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 146, 32 S.Ct. 224, 56 L.Ed. 377 (1912) ("*Pacific States*"). By declining to do so it grievously erred.

Unlike the Fifth and Fourteenth Amendments, the focus of Article IV, section 4 of the United States Constitution is not on what a state cannot do (e.g., deny persons due process of law) or what a state must do (e.g., pay just compensation if private property is taken for public use). The Guarantee Clause does not require a state to do anything. Article IV, section 4 focuses entirely on what the United States government is required to do. It is also apparent that under this clause that each branch of the government established by Articles I, II, and III has the duty to use its own unique and separate powers, whenever necessary, to assure that each state provides its citizens with a state

government that is republican in form.

This Court has never held (and it certainly did not hold in either *New York* or *Pacific States*) that Article IV, section 4, commits all questions regarding the existence of a republican form of state government to the "political departments" of the federal government. This singularly important guarantee and unqualified duty to act precedes, and is not limited by, the separate and distinct obligation to protect the states from rebellion, which this Court has held, is exclusively committed to the "political departments" for the reasons clearly articulated by Justice White in *Pacific States*.

Regrettably, *Murtishaw* completely ignores what Justice White so clearly articulated in *Pacific States*: the fact that "political questions" regarding the existence of a republican form of state government are entrusted to Congress does not destroy the federal courts' Article III "judicial power and ever-present duty whenever it becomes necessary, in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power." *Pacific States*, *supra*, 223 U.S. at 150.

There is simply no political question to be resolved when the "governmental power" of a state, whether exercised by its People, its political departments or its highest court, is exercised to make enforcement of judgments a matter of local politics- not law. And, when such a result is encouraged and condoned by a state's highest court, the only branch of the federal government with the ability "to enforce and uphold the applicable provisions of the Constitution" is the federal judiciary.

As this Court stressed in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) from the earliest days of the Republic (see, e.g., *Hayburn's Case* (2 Dall., at 411)), this Court's decisions have uniformly provided "fair warning" that in our constitutional form of government judicial decisions cannot be made subject to political review. Contrary to this accepted principle, the California Supreme Court has held Articles XIII.A, XIII.C and XIII.D of the California Constitution can properly require consent of the People before *any* taxes can be levied to pay *any* type of final judgment rendered by *any* court enforcing *any* law against a local governmental agency. The political branches of the federal government, even were they so inclined, have no means to enforce the Guarantee Clause in this setting. The judicial power granted the federal courts under Article III, and only that power, is available to uphold the principles of a republican form of government when a states highest court allows the ultimate decision as to the payment of just compensation due under the United States Constitution to be decided by the vote of local voters who take no oath to uphold the United States Constitution.

4. VGV's Federal Due Process Challenge Also Had Merit and the Ninth Circuit's Refusal to Consider That Issues Was Not Justified.

The Ninth Circuit also declined to comment on the California Supreme Court's holding that VGV's federal Due Process challenge to Proposition 13 lacked merit. The reason it gave in its Memorandum Decision for not considering this important federal issue was that VGV had purportedly not raised the issue in its Opening Brief before the Ninth Circuit. (App. B at 6a.) Of course, VGV could not have addressed in its Opening Brief the Due Process concern that did not arise

until the California Supreme Court's unexpected invocation of Chapter 9. But more troubling, is that VGV's Opening Brief did argue, in addition to its Guarantee Clause challenge, that a system of state laws, "that would replace the rule of law with an arbitrary system where the rights of the judgment creditor could be nullified at the whim of a mere one-third of the local property owners" would also "deprive all judgment creditors of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution." (App. L at 108a-110a). As VGV pointed out in its Petition for Rehearing in the Ninth Circuit, not only was this argument raised in its Opening Brief but also under this Court's recent decision in *Lujan v. G&G Fire Sprinklers, Inc.* 532 U.S. 189, 121 S.Ct. 1446, 1451(2001) it had the duty to consider this federal question. *Lujan* held that what constitutes "ordinary judicial process" comporting with the dictates of the Fourteenth Amendment's Due Process Clause is itself a federal question. A federal question the federal courts must answer based on history, reason, and the past course of judicial decisions. (App. L at 108a-109a.) As VGV specifically pointed out in its Petition for Rehearing, the Ninth Circuit failed to make that inquiry:

> "Although the California Supreme Court can choose to ignore the "involuntary indebtedness" rule that has been consistently applied by the courts of California for over 140 years, this Court cannot. As *Lujan* makes clear, what is and is not "ordinary judicial process" that comports with the Due Process Clause is a question to be determined by history, reason, and the past course of judicial decisions. These cases are relevant to that inquiry. VGV's Due Process argument was

not waived and should be considered." (App. L at 110a.)

That ordinary judicial process employed throughout history to enforce such judgments is a judicial mandate to levy taxes has never been questioned in this Nation. Once again, as this Court pointed out in *Missouri v. Jenkins,* 495 U.S. 33, 55, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990) there was a long and venerable line of cases where:

> "this Court held that federal courts could issue the writ of mandamus to compel local governmental bodies to levy taxes adequate to satisfy their debt obligations. See, e.g., *Louisiana ex rel. Hubert v. Mayor and Council of New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144 (1909); *Graham v. Folsom*, 200 U.S. 248, 26 S.Ct. 245, 50 L.Ed. 464 (1906); *Wolff v. New Orleans*, 103 U.S. 358, 26 L.Ed. 395 (1881); *United States v. New Orleans*, 98 U.S. 381, 25 L.Ed. 225 (1879); *Heine v. Levee Commissioners*, 19 Wall. 655, 657, 22 L.Ed. 223 (1874); *City of Galena v. Amy*, 5 Wall. 705, 18 L.Ed. 560 (1867); *Von Hoffman v. City of Quincy,* 4 Wall. 535, 18 L.Ed. 403 (1867); *Board of Commissioners of Knox County v. Aspinwall*, 24 How. 376, 16 L.Ed. 735 (1861)."

Whether or not the People of California, the California Legislature or the California Supreme Court can prohibit judicial enforcement of judgments in this historically accepted fashion (and by doing so empower local public entities to cram a judgment down its creditor's throat under Chapter 9) without running afoul of the Due Process Clause was another

important federal question the Ninth Circuit left unanswered.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-55269
D.C. No. CV-94-03262-HLH
[Filed, September 24, 2001]

VENTURA GROUP VENTURES, INC.,
Plaintiff-Appellant,

v.

VENTURA PORT DISTRICT; VENTURA PORT DISTRICT PUBLIC FACILITIES CORPORATION; VENTURA PORT DISTRICT PUBLIC IMPROVEMENT CORPORATION; THE BOARD OF PORT COMMISSIONERS OF VENTURA PORT DISTRICT; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Merchants Bank, Kansas City Missouri, LYW Ventura Harborview Limited Partnership and Great Western Bank; BOARD OF SUPERVISORS, of Ventura County,
Defendants-Appellees.

Before: BROWNING, THOMAS and WARDLAW, Circuit Judges.

ORDER

The appellant's petition for rehearing is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-55269
[Filed, August 29, 2001]

VENTURA GROUP VENTURES, INC.,
Plaintiff-Appellant,

v.

VENTURA PORT DISTRICT; VENTURA PORT DISTRICT PUBLIC FACILITIES CORPORATION; VENTURA PORT DISTRICT PUBLIC IMPROVEMENT CORPORATION; THE BOARD OF PORT COMMISSIONERS OF VENTURA PORT DISTRICT; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Merchants Bank, Kansas City Missouri, LYW Ventura Harborview Limited Partnership and Great Western Bank; BOARD OF SUPERVISORS, of Ventura County,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-94-03262-HLH
Harry L. Hupp, District Judge, Presiding

JUDGES:
Before: BROWNING, THOMAS and WARDLAW, Circuit Judges.

OPINION

MEMORANDUM*

We certified two questions to the Supreme Court of California:

1. Does Article XIII A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the one percent limit, pursuant to California Harbors and Navigation Code §6361 to pay a money judgment as required by California Government Code §§970-971?

2. Does a port district created pursuant to California Harbors and Navigation Code §6210 have independent authority to impose assessments under California Harbors and Navigation Code §6365(d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?

The Supreme Court of California accepted certification and held:

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

> In summary, we answer the first of the certified questions by advising the Ninth Circuit that, under the facts of this case, article XIII A does prohibit a county from levying property taxes in excess of 1 percent to pay a money judgment under Harbors and Navigation Code section 6361 and Government Code sections 970 to 971.
>
> . . .
>
> In conclusion, we answer the second of the questions certified by the Ninth Circuit as follows: A port district created pursuant to Harbors and Navigation Code section 6210 does have independent authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it, *so long as the assessments satisfy the applicable statutory and constitutional requirements*. However, this port district may not impose an assessment to raise the funds to satisfy the judgment in question here because the assessment would not *specially benefit* the parcels upon which it would be imposed.

Ventura Group Ventures, Inc. v. Ventura Port Dist., 24 Cal. 4th 1089, 1104, 1108 (Cal. 2001).

This response makes clear that Ventura Port District may *not* raise property taxes higher than one percent or impose a special assessment under Harbors and Navigation Code §6365(d)(2) to satisfy Ventura Group Ventures' money

judgment against it.

Ventura Group Ventures also contends that the district court's interpretation of Proposition 13 preventing the imposition of additional property taxes to satisfy judgments violates the guarantee of a republican form of government in violation of U.S. Const. art. IV, §4. "A challenge based on the Guarantee Clause, however, is a nonjusticiable political question." *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001).[1]

For these reasons, the judgment of the district court is **AFFIRMED.**

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[1] Ventura Group Ventures also mentions a violation of due process; however, because it did not argue this claim in its opening brief, we deem it waived. See *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998).

APPENDIX C

UNITED STATES COURT OF APPEALS
F I L E D FOR THE NINTH CIRCUIT

No. 97-55269
D.C. No. CV-94-03262-HLH
[Filed, April 9, 2001]

VENTURA GROUP VENTURES, INC.,
Plaintiff-Appellant,

v.

VENTURA PORT DISTRICT; VENTURA PORT DISTRICT PUBLIC FACILITIES CORPORATION; VENTURA PORT DISTRICT PUBLIC IMPROVEMENT CORPORATION; THE BOARD OF PORT COMMISSIONERS OF VENTURA PORT DISTRICT; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Merchants Bank, Kansas City Missouri, LYW Ventura Harborview Limited Partnership and Great Western Bank; BOARD OF SUPERVISORS, of Ventura County,
Defendants-Appellees.

Before: BROWNING, THOMAS and WARDLAW, Circuit Judges.

ORDER

The parties are hereby ordered to submit simultaneous briefs of no more than twenty five pages by April 30, 2001, apprising this Court on the effect of the California Supreme Court's opinion in *Ventura Group Ventures, Inc. v. Ventura Port Dist.*, 24 Cal. 4th 1089, 16 P.3d 717 (Cal. 2001) on the remaining issues in this appeal.

APPENDIX D

S080112

IN THE SUPREME COURT OF CALIFORNIA

En Banc

[Filed, March 28, 2001]

VENTURA GROUP VENTURES INC., Appellant,	)
v.	)
VENTURA BOARD OF SUPERVISORS et al., Appellants.	)

Petition for rehearing DENIED.

/s/
Chief Justice

APPENDIX E

SUPREME COURT OF CALIFORNIA

No. S080112.

[Decided, February 15, 2001]

VENTURA GROUP VENTURES, INC.,)
Plaintiff and Appellant,)
)
v.)
)
VENTURA PORT DISTRICT et al.,)
Defendants and Respondents.)
)

OPINION

BROWN, J.

We granted the request of the United States Ninth Circuit Court of Appeals for the answers to the following certified questions of law under rule 29.5 of the California Rules of Court:[1]

"1. Does [a]rticle XIII A of the California

[1] All further references to rules are to the California Rules of Court unless otherwise indicated.

Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the one percent limit, pursuant to California Harbors and Navigation Code [section] 6361 to pay a money judgment as required by California Government Code [sections] 970- 971?

"2. Does a port district created pursuant to California Harbors and Navigation Code [section] 6210 have independent authority to impose assessments under California Harbors and Navigation Code [section] 6365[, subdivision] (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?" (*Ventura Group Ventures, Inc. v. Ventura Port Dist.* (9th Cir. 1999) 179 F.3d 840, 841 (Ventura Group Ventures).)

I. BACKGROUND

A. *Certification*

Rule 29.5(a) provides that we may answer questions of law certified to us by a federal court of appeals (or the court of last resort of any state), provided the certifying court requests the answer, the question may be determinative of a cause pending in the certifying court, and the decisions of the California Courts of Appeal or this court provide no controlling precedent concerning the certified question. The factors set forth in rule 29.5(a) are met here. The Ninth Circuit has requested that we answer the questions it posed; our answers to the questions will be determinative of part of the appeal pending before it, and there is no controlling California precedent. Another factor weighing in favor of accepting the request, one that we "ordinarily consider[] in deciding whether to grant review of a decision of a California

Court of Appeal or to issue an alternative writ or other order in an original matter" (rule 29.5(f)(1)), is that answering the questions certified will help settle important questions of law. (Rule 29.)

B. *Facts and Procedural History*[2]

Ventura Port District (District) was organized by the County of Ventura in 1952 as a local governmental entity to operate and develop the Ventura harbor. The District was created pursuant to Harbors and Navigation Code section 6210. The District is governed by a board of port commissioners pursuant to Harbors and Navigation Code section 6240.

In 1979, the District leased real property along the harbor to Ocean Services Corporation (Ocean), a corporation that had agreed to develop a commercial marina on the harborfront property. The District, however, failed to disclose a restrictive covenant on the property that prohibited the commercial development of part of the property for 10 years. Once Ocean learned of the covenant, the District provided repeated assurances that the covenant would be removed quickly and at the District's expense. Ocean continued to plan the project, obtained the necessary licensing, preleased the property, guaranteed the loan payments for the necessary financing, and expended a large amount of money and effort to complete the development project.

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[2] The entire factual and procedural history is adopted from the certification request, *Ventura Group Ventures*, *supra*, 179 F.3d at pages 841-843.

Meanwhile, the landowners benefitting from the restrictive covenant filed a lawsuit against the District and Ocean to enjoin the project. In 1981, the owners successfully obtained a preliminary injunction. In 1982, Ocean informed the District that its losses on the project had reached $1.8 million due to the injunction. In 1983, the parties settled the restrictive covenant lawsuit, but the District refused to renegotiate Ocean's lease or cover any of Ocean's losses.

In January 1984, Ocean filed a lawsuit in the Superior Court of Ventura County against the District for breach of contract, deceit, and promissory estoppel. The parties continued to have difficulties with the terms of the lease and with the development of the property. In 1987, Ocean filed for reorganization under chapter 11 of the United States Bankruptcy Code (11 U.S.C.). The District secured an order from the federal bankruptcy court declaring that the lease between the District and Ocean had been rejected, and then evicted Ocean from the property and took control of the marina facilities. In 1988, Ocean converted the chapter 11 bankruptcy proceeding to a chapter 7 bankruptcy proceeding, but the court permitted Ocean and its creditors to continue to pursue the lawsuit against the District.

At trial, Ocean argued that the District had breached the implied covenant of quiet enjoyment and the implied covenant of good faith and fair dealing. On September 25, 1990, a jury awarded Ocean $31,352,595, which the trial judge later reduced to $16,971,767.

In 1991, Ocean recorded an abstract of judgment against the District. Ocean believed that its abstract of judgment created a judgment lien against the District and

secured creditor status for itself. At the same time, the District recorded an "Extinguishment of Lien." The District then encumbered a portion of its real property in a series of transactions, one of which resulted in the District's giving a deed of trust against some of its property to Merchants Bank of Kansas City.

In April 1990 and pursuant to Ocean's chapter 7 proceeding, Ocean sold and assigned its cause of action against the District to a new corporation formed by Ocean's former shareholders, Ventura Group Ventures (VGV), appellant herein. In May 1993, the Second District Court of Appeal affirmed VGV's verdict (*Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal. App. 4th 1762, 1782 [19 Cal. Rptr. 2d 750]), but in an unpublished portion of the decision reduced the award to $15,560,169, plus costs and interest.

On August 20, 1997, VGV filed the instant action in the Superior Court of Ventura County to enforce the judgment. VGV sued the District, the County of Ventura (County), Merchants Bank of Kansas City, and other parties that VGV believed would contest the priority of VGV's judgment against the District. First, VGV sought a declaratory judgment that the District and the County were required under state law to pay the judgment either by selling property or levying additional taxes or assessments, or that in the alternative, VGV could execute against the District's property. Second, VGV asked for a writ of mandate against the District and the County in the amount of the judgment. VGV included a claim for slander of title against the individual attorneys for filing the extinguishment of lien. VGV also sought a determination that its abstract of judgment

gave it priority over the District's other creditors.

Immediately thereafter, the District filed a chapter 9 bankruptcy petition, and VGV's claims against the District were automatically stayed. The federal bankruptcy court granted VGV relief from the automatic stay, permitting VGV to go forward solely with its claim for a declaratory judgment to determine if VGV could force the District or the County to levy a property tax in order to pay the judgment.

After VGV's complaint was filed, the Federal Deposit Insurance Corporation became the receiver for Merchants Bank of Kansas City and, as a party defendant, removed the case to the United States District Court for the Central District of California. The federal district court then remanded the slander of title claims to the Ventura County Superior Court. All that remained in the federal case was the claim for a declaratory judgment determining the rights and obligations of VGV, the District, and the County regarding the payment of VGV's state court judgment, and a determination of whether an abstract of judgment against a public entity could create a judgment lien giving VGV priority over the District's other creditors.

In January 1997, pursuant to its grant of summary judgment to the County and its final judgment after a bench trial, the federal district court held that: (1) article XIII A of the California Constitution (Proposition 13) prohibited the County from levying an additional property tax to satisfy VGV's judgment; (2) Proposition 13 and Revenue and Taxation Code section 95 prohibited the County from reallocating revenue generated from permissible property taxes to satisfy the judgment; (3) the District could not levy

a special assessment to satisfy VGV's judgment; (4) VGV could not proceed with a writ of execution against the District's property; (5) VGV's abstract of judgment did not create a judgment lien for the purpose of establishing VGV's priority; and (6) the other creditors had liens superior to VGV.

The federal district court did hold that VGV could obtain a writ of mandate against the District for the purpose of satisfying the judgment, and that a court considering the issuance of the writ could order the District to sell some of its property to satisfy the judgment. The District did not appeal this determination. VGV limited its Ninth Circuit appeal to the consideration of the first three issues listed in the preceding paragraph, along with federal constitutional claims, and agreed to dismiss its appeal as to all defendants except the District and the County.

In April 1998, the federal bankruptcy court approved the District's modified chapter 9 plan of debt adjustment. As part of the plan, VGV received $7,739,821.23 as an unsecured creditor. Although the bankruptcy court noted the federal district court's determination against VGV, the modified plan provided that VGV retained the right to pursue its appeal of the district court's judgment in the Ninth Circuit. If the appeal is successful, the bankruptcy court stated: "[T]he District will levy the tax as directed by the Ninth Circuit, or, if the subject proceedings are remanded, by the District Court so that the tax will be included in the real property tax bills issued by the Ventura County Tax Collector. If and when such taxes are collected by the County of Ventura and remitted to the District, the District shall distribute the funds as required by applicable law or order of court."

On December 10, 1998, the chapter 9 bankruptcy proceeding was closed.

II. DISCUSSION

A. *Question No. 1*

Again, the first question is: "Does [a]rticle XIII A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the one percent limit, pursuant to California Harbors and Navigation Code [section] 6361 to pay a money judgment as required by California Government Code [sections] 970- 971?" (*Ventura Group Ventures*, *supra*, 179 F.3d at p. 841.)

California Constitution, article XIII A, section 1[3] provides: "(a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1) of the full cash value of such property. The one percent (1) tax to be collected by the counties and apportioned according to law to the districts within the counties. [P] (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) [i]ndebtedness approved by the voters prior to July 1, 1978, or (2) [b]onded indebtedness for the acquisition . . . of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting

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[3] All article references are to the California Constitution unless otherwise indicated.

on the proposition."

Government Code section 970.8, subdivision (a) provides that a district shall include in its budget each fiscal year sufficient funds to pay all judgments rendered against it. Harbors and Navigation Code section 6361 provides that a port district shall annually furnish the county board of supervisors with a written estimate of the amount of money the district will need "for all purposes" in the ensuing fiscal year, and "[t]hereupon, it is the duty of the board of supervisors to levy a special tax, on all taxable property of the county lying within the district, sufficient in amount to raise that sum."

1. *Exception for Prior Indebtedness*

In its opening brief, VGV argued that this judgment constitutes an "indebtedness approved by the voters prior to July 1, 1978," and is thus not subject to the 1 percent limit set out in article XIII A because it comes within the exception stated in section 1, subdivision (b)(1) of that article. "Here, the local voters themselves approved the creation of the District in 1952 knowing that state law (i.e., Harb. & Nav. Code, §6361) mandated that the County of Ventura would levy a special property tax each year up to the maximum tax rate specified in Harbors and Navigation Code [section] 6362 to cover the District's outstanding liabilities." An amicus curiae brief filed by Twenty-Eight California Cities in support of the District correctly observed that this argument was a "stretch of logic [that] would gut Proposition 13," and VGV has abandoned it. In any event, VGV's argument was meritless because the District's debt occurred no earlier than 1979 when the lease with Ocean was executed, and so it did

not arise prior to 1978 when Proposition 13 was adopted.

2. *Harbors and Navigation Code Section 6361*

VGV next contends Proposition 13 was not intended to repeal Harbors and Navigation Code section 6361. "The State Legislature is understandably concerned as much now as it was in 1937 that any port district formed in this state be financially sound. This concern is clearly one reason why the Legislature has left these statutes intact. If that key piece of this legislation, i.e., the pledge of taxing support, were impliedly deleted by Proposition 13, it would destroy the statutory framework the Legislature adopted in 1937 governing the formation and operation of local port districts that is essentially unchanged to the present. For this reason alone, it is not reasonable to conclude that Proposition 13 was intended to repeal Harbors and Navigation Code section 6361."

The District aptly characterizes pre-Proposition 13 practice under Harbors and Navigation Code section 6361 as "budgeting first, taxing later." That is, as we have explained above, a port district was required to furnish the county board of supervisors with a written estimate of the amount of money the district would need in the coming fiscal year, and it was then the duty of the board "to levy a special tax, on all taxable property of the county lying within the district, sufficient in amount to raise that sum." (Harb. & Nav. Code, §6361.) If VGV is contending that in adopting Proposition 13, the voters intended to permit counties, on behalf of port districts, to continue to levy property taxes without regard to the 1 percent limit, VGV is plainly wrong. Moreover, VGV's argument appears to reveal a fundamental misunderstanding as to whose

intent controls here. We may assume for the sake of argument that, as VGV contends, "[t]he State Legislature is understandably concerned as much now as it was in 1937 that any port district formed in this state be financially sound." However, the question is what the *voters* intended when they adopted Proposition 13, and it is clear that, as far as they were concerned, the practice of "budgeting first, taxing later" was no longer acceptable. Harbors and Navigation Code section 6361 has been superseded by the statutes implementing article XIII A insofar as, where applicable, they are inconsistent. Article XIII A, section 1, subdivision (a) provides that the 1 percent tax collected by the counties is to be "apportioned according to law" to the districts within the counties. The Legislature read this language as conferring authority to legislate on the subject and to apportion the tax funds to local agencies and districts. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal. 3d 208, 246 [149 Cal. Rptr. 239, 583 P.2d 1281] (Amador).) Formulae for the distribution of tax funds to local agencies and districts have been enacted by the Legislature. (See Rev. & Tax. Code, §93 et seq.) Therefore, a district can no longer expect a county to levy taxes to raise whatever sum the district budget calls for. That those days are long gone should come as no surprise to VGV or anyone else.

3. *Judgments Resulting from Discretionary/Nondiscretionary Acts*

VGV's fallback position is that, even if article XIII A otherwise limits a county's taxing authority under Harbors and Navigation Code section 6361, it was not intended to apply to a judgment like this one, which VGV characterizes as a *judgment resulting from a nondiscretionary act.*

"Proposition 13," VGV asserts, "was not intended to repeal the carefully crafted statutes the Legislature had adopted just five years earlier to govern the payment of judgments of this nature." The statutes upon which VGV relies are sections 2205 and 2271 of the Revenue and Taxation Code and sections 970.8 and 971 of the Government Code. We will first set out the statutes and then consider whether they support VGV's position.

Section 2271 of the Revenue and Taxation Code provides in pertinent part: "A local agency may levy, or have levied on its behalf, a rate in addition to the maximum property rate established pursuant to this chapter (commencing with Section 2201) to pay costs mandated by the federal government or *costs mandated by the courts* or costs mandated by initiative enactment, which are not funded by federal or state government." (Italics added.)

Section 2205 of the Revenue and Taxation Code provides in pertinent part: " 'Costs mandated by the courts' do not include (i) costs incurred as a result of a judgment in an eminent domain or condemnation proceeding, (ii) costs incurred in order to comply with a final court order mandating the specific performance, or awarding damages as a result of nonperformance, of any contract or agreement entered into after January 1, 1973, and (iii) costs incurred as a result of a final court order which requires a local agency or school district to comply with a state-mandated program or service enacted after January 1, 1973, which the court has determined that the local agency or school district has failed to comply with prior to such order."

Section 970.8, subdivision (a) of the Government

Code provides: "Each local public entity shall in each fiscal year include in its budget a provision to provide funds in an amount sufficient to pay all judgments in accordance with this article."

Section 971, subdivision (c) of the Government Code provides: "For the purposes of Section 2271 of the Revenue and Taxation Code, taxes levied to pay pursuant to this article a judgment resulting from a nondiscretionary act are levied to pay costs mandated by the courts." Section 971, subdivision (a)(1) of the Government Code provides: " 'Judgment resulting from a discretionary act' means a judgment arising from a liability which the local public entity has discretion to incur or not to incur and includes a judgment rendered in an eminent domain proceeding and a judgment requiring specific performance of a contractual obligation or awarding damages for failure to perform a contractual obligation."

As the statutes make clear, even before Proposition 13, the *nondiscretionary* obligations for which an agency was permitted to tax over the limit did not include all court judgments, on the theory that the duty to pay a judgment is mandatory rather than discretionary. Instead, the discretionary/nondiscretionary distinction focused on the voluntary or involuntary nature of the *original liability* that *resulted* in the court judgment. Judgments founded in contract and eminent domain were discretionary, while judgments founded in tort and inverse condemnation were nondiscretionary.

This judgment was founded in contract. It resulted from two discretionary acts: The District's decision to enter into a ground lease with Ocean, and the District's subsequent

decision to violate the implied covenant of good faith and fair dealing. (*Ocean Services Corp. v. Ventura Port Dist., supra,* 15 Cal. App. 4th at pp. 1780-1781.) Therefore, the judgment is not covered by the statutory exemption for " '[c]osts mandated by the courts.' " (Rev. & Tax. Code, §§2205, 2271; Gov. Code, §§970.8, 971.) Because VGV's argument does not withstand statutory analysis, we need not reach the question whether an exception for judgments resulting from nondiscretionary acts should be read into article XIII A. (See *Amador, supra*, 22 Cal. 3d at p. 233 ["As a general rule, courts will not reach constitutional questions 'unless absolutely necessary to a disposition' of the case before them"].)

4. *Constitutional Questions*

VGV contends article XIII A is inconsistent with the United States Constitution's guarantee clause, which directs the United States to "guarantee to every State in this Union a Republican Form of Government." (U.S. Const., art. IV, §4.) In most of the cases in which the United States Supreme Court has been asked to apply the guarantee clause, the high court has found the claims presented to be nonjusticiable under the political question doctrine. (*New York v. United States* (1992) 505 U.S. 144, 184 [112 S. Ct. 2408, 2432-2433, 120 L. Ed. 2d *120].)* However, in *Amador, supra*, 22 Cal. 3d at page 227, we squarely rejected the claim that article XIII A would "result in a change from a 'republican' form of government (i.e., lawmaking by elected representatives) to a 'democratic' governmental plan (i.e., lawmaking directly by the people)." "Contrary to petitioners' assertion . . . we are convinced that article XIII A . . . does not change our basic governmental plan. Following the

adoption of article XIII A both local and state government will continue to function through the traditional system of elected representation. Other than in the limited area of taxation, the authority of local government to enact appropriate laws and regulations remains wholly unimpaired." (*Amador*, at p. 227.) VGV's efforts to distinguish *Amador* are unavailing. At bottom, what VGV is complaining of is not that article XIII A undermines this state's republican form of government, but that it permits local voters to deny VGV recovery on its judgment in violation of due process of law and the takings clause.

VGV's due process argument is itself a makeweight, consisting solely of an analogy to criminal law, in which VGV compares its situation to that of a criminal defendant who has been acquitted by a jury only to find that the voters can override the jury's verdict. The analogy is not helpful. Article XIII A does not nullify the judgment against the District. It simply restricts the ability of the District to raise taxes in order to pay the judgment. VGV is not thereby denied all means of satisfying its judgment. Indeed, the bankruptcy court awarded VGV almost $ 8 million for assigned rights it purchased from Ocean in 1990, long after Proposition 13 was adopted. Ironically, in the name of due process, VGV would deny districts the protections afforded them under chapter 9 of the federal Bankruptcy Code.

Finally, VGV contends that an exception for judgments must be read into article XIII A in order to avoid a construction that would permit takings in violation of the Fifth Amendment to the United States Constitution.

VGV's argument rests entirely upon a recent decision

of the Court of Appeal-- *F & L Farm Co. v. City Council (1998)* 65 Cal. App. 4th 1345 [77 Cal. Rptr. 2d 360] (*F & L Farm Co.*). *F & L Farm Co.* arose from an inverse condemnation action brought by several farmers against the City of Lindsay. The city had for years accepted saline industrial wastewater from an olive processing facility, holding the wastewater first in percolation ponds and later in lined evaporation ponds. Eventually much of the salt from the wastewater percolated into the groundwater through the percolation ponds and through holes in the liners of the evaporation ponds, causing injury (lost profits from crops and permanent reduction in land value) to farms in the vicinity of the ponds. The farmers obtained judgments totaling $3 million, and the city appealed, claiming that articles XIII A, XIII B, XIII C, and XVI so limited its ability to tax and spend as to override its statutory duty to pay the judgments. The Court of Appeal framed the issue before it as follows: "When a city in California has deprived California residents of constitutionally protected property interests and a judgment has been entered against it to compensate the residents for the wrongs committed, may the city simply refuse to pay the judgment on the basis that it has no spare money? We think not." (*F & L Farm Co.*, at p. 1347.)

F & L Farm Co. is distinguishable on two grounds. First, *F & L Farm Co.* involved a judgment founded in inverse condemnation, and as we have explained above, judgments founded in tort and inverse condemnation, unlike judgments founded in contract and eminent domain, *are* covered by the statutory exemption for " '[c]osts mandated by the courts.' " (Rev. & Tax. Code, §§ 2205, 2271; Gov. Code, §§ 970.8, 971.) Second, unlike the City of Lindsay, the District here has not been permitted to avoid satisfaction of

VGV's judgment on the ground it "has no spare money." (*F & L Farm Co.*, *supra*, 65 Cal. App. 4th at p. 1347.) To the contrary, as a result of the bankruptcy proceeding, VGV has received nearly $8 million, half of the sum awarded it. The discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment to the United States Constitution.

The analysis of article XIII A in *F & L Farm Co.* got off on the wrong track because the case focused on *whether*, rather than *how*, the City was required to satisfy the judgment. *F & L Farm Co.* got the *whether* right, but it got the *how* wrong. That is, article XIII A is most assuredly not a license to "stiff" judgment creditors with impunity. The bankruptcy award of almost $8 million against the District here is proof of that. However, the fact that article XIII A does not absolutely shield a local public entity from a judgment creditor does not mean that a court can compel a county to levy property taxes in excess of article XIII A's 1 percent limit in order to satisfy the judgment.

In concluding that the judicially created nondiscretionary debt exception should be imported from article XVI, section 18 to article XIII A, the Court of Appeal in *F & L Farm Co.* relied principally upon the canon that a statute (or constitutional provision) susceptible of several interpretations should be construed so as to avoid serious constitutional problems. (*F & L Farm Co.*, *supra*, 65 Cal. App. 4th at p. 1353.) This canon is beside the point here, though, for as we have just concluded, the constitutional challenges raised by VGV are meritless.

Also beside the point, and for the same reason, is the

analysis in *F & L Farm Co.* of voter intent in adopting Proposition 13. On the one hand, the Court of Appeal conceded that neither the language nor the history of Proposition 13 gave " 'any indication whatsoever that there was any thought or consideration given to the potential impact . . . on the subject matter at hand,' that is, payment of inverse condemnation judgments." (*F & L Farm Co.*, *supra*, 65 Cal. App. 4th at p. 1354.) On the other hand, the Court of Appeal found the general tenor of the ballot arguments in favor of the proposition, which the court characterized as having a " 'populist' " flavor, inconsistent with denying relief to the judgment creditors because "[t]he entire context of modern 'takings' theory shares this same populist, antigovernment philosophical base." (*Ibid.*) "We cannot rationally conclude that the voters, in enacting the initiative limitations on 'big government,' intended to empower these same governments to damage private property with impunity and without effective means of compelling the payment of just compensation to injured citizens." (*Ibid.*) The flaw in the court's reasoning, as we have explained, lies in its assumption that a city will be free to damage private property with impunity unless judgment creditors can compel the county to satisfy the judgment by levying taxes in excess of article XIII A's 1 percent limit.

To attack the same point from a different angle: Proposition 13 put local government on a strict budget and thus required it to make painful choices. In *F & L Farm Co.*, *supra*, 65 Cal. App. 4th at page 1348, the Court of Appeal was unwilling to excuse payment of the judgments on the ground the City of Lindsay would suffer " 'undue hardship.' " However, the court did apparently accept the underlying premise of the city's argument--that it should not be forced to

make tough decisions. Thus, to permit the city to pay the judgments without making painful choices, the court held article XIII A inapplicable to judgments. In fact, the options before the court were not restricted to letting the city walk away from the judgments or letting it raise extra money by levying property taxes in excess of the 1 percent limit established by article XIII A. The city could not, consistent with Proposition 13, avoid making painful choices, but it could have mitigated the pain if it had accepted the offer of the farmers to pay the judgments in installments pursuant to Government Code section 970.6. (*F & L Farm Co.*, at p. 1349, fn. 3.) Another option, not addressed in *F & L Farm Co.*, is that the City of Lindsay might have qualified for bankruptcy protection, as did the District here. Therefore, we disapprove *F & L Farm Co.*, *supra*, 65 Cal. App. 4th 1345, insofar as it conflicts with the views expressed herein.

In summary, we answer the first of the certified questions by advising the Ninth Circuit that, under the facts of this case, article XIII A does prohibit a county from levying property taxes in excess of 1 percent to pay a money judgment under Harbors and Navigation Code section 6361 and Government Code sections 970 to 971.

B. Question No. 2

To repeat, the second question certified to us by the Ninth Circuit is: "Does a port district created pursuant to California Harbors and Navigation Code [section] 6210 have independent authority to impose assessments under California Harbors and Navigation Code [section] 6365[, subdivision] (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?" (*Ventura Group Ventures*, *supra*, 179

F.3d at p. 841.)

The Ninth Circuit emphasized that its phrasing of the issues should not restrict our consideration (*Ventura Group Ventures*, *supra*, 179 F.3d at p. 841) and it is helpful to unpack the general and specific questions embedded in this query. The first question is a general one: Does *a* port district have such authority? The second question is specific: Does *this* port district have such authority under the circumstances shown here?

The answer to the first question is *yes*. Generally speaking, a port district created pursuant to Harbors and Navigation Code section 6210 does have independent authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it, *so long as the assessments satisfy the applicable statutory and constitutional requirements*.

However, the answer to the second question is *no*. Under the circumstances of this case, the statutory and constitutional requirements for an assessment are not met. The principal requirement that is unsatisfied, as we explain below, is that an assessment *specially benefit* the parcels upon which it is levied.

1. *The Statutory Framework*

Section 6365, subdivision (d)(2) of the Harbors and Navigation Code provides: "Notwithstanding any other provision of law, the district may levy and collect assessments and reassessments in the same manner as provided in Article

3 (commencing with Section 51320) of Chapter 2 of Part 7 of Division 15 of the Water Code, to pay any or all of the following: [P] . . . [P] (2) For the satisfaction of liabilities arising from projects."

Section 51323 of the Water Code provides: "The commissioners shall view and fix upon the district land an assessment valuation per acre for each parcel which is *in proportion to the benefits to be derived* from the continuance in operation of the district reclamation works." (Italics added.)

Sections 51329 to 51334 of the Water Code establish procedures for an aggrieved person to file with the county board of supervisors a written objection to the assessment valuations, for the board of supervisors to conduct a hearing on objections and to modify or amend the assessment valuations, and for an aggrieved person to file an action in superior court to have the assessment valuations corrected, modified, or annulled.

2. *The Constitutional Framework*

In 1996, Proposition 218 was approved by the voters in a statewide initiative. It added two articles to the California Constitution that govern the procedures to be followed by local governments wishing to adopt or increase taxes, assessments, fees, or charges. Article XIII C deals with taxes, and article XIII D deals with assessments, fees, and charges.

Section 3, subdivision (a) of article XIII D provides that all assessments must conform to the requirements of that article. Section 4 of article XIII D provides that no

assessment is to be imposed on a parcel which exceeds the reasonable cost of the proportional special benefit conferred upon the parcel, that only special benefits are assessable, and that the agency which proposes to levy the assessment must separate the general benefits from the special benefits to be conferred on the parcel. Section 2, subdivision (i) of article XIII D defines " 'special benefit' " as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute 'special benefit.' "

Section 4 of article XIII D sets out the procedures to be followed by an agency proposing to levy an assessment. All assessments are to be supported by a detailed engineer's report. (*Id.*, §4, subd. (b).) Notice of the amount of the proposed assessment for each identified parcel is to be mailed to the record owner (*id.*, subd. (c)), the notice is to include a ballot on which the owner may indicate support or opposition for the proposed assessment (*id.*, subd. (d)), and, not less than 45 days after the mailing, a public hearing is to be held at which the agency proposing to levy the assessment shall consider any protests against it and tabulate the ballots (*id.*, subd. (e)). The agency may not impose an assessment if there is a majority protest (*ibid.*), and in a legal action contesting the validity of an assessment, the agency has the burden of demonstrating that the property in question would receive a special benefit and that the amount of the contested assessment is proportional to, and no greater than, the benefit conferred (*id.*, subd. (f)).

Our decisions prior to its adoption were consistent with Proposition 218 in requiring that an improvement that

was the subject of a special assessment had to *specially benefit* the assessed property. That distinguished a special assessment from a special tax. A special assessment was levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement, while a special tax was not required to specially benefit the taxed property. (*Knox v. City of Orland (*1992) 4 Cal. 4th 132, 142 [14 Cal. Rptr. 2d 159, 841 P.2d 144].) Because the rationale of a special assessment was that the assessed property had received or would receive a special benefit over and above that received by the general public (*ibid.*), the amount of the assessment could not exceed the benefit to the property (*County of Fresno v. Malmstrom (1979)* 94 Cal. App. 3d 974, 984 [156 Cal. Rptr. 777]).

3. *Special Benefit Lacking Here*

VGV contends that, under the circumstances of this case, the linkage between special assessments and special benefits should be reconsidered. "The line between special assessments and special taxes articulated by the courts [citation] becomes blurred when considering assessments levied by a local port district which was created to bestow a benefit on all property within its boundaries. A port district formed under Harbors and Navigation Code section 6200 et seq. can only include, within its boundaries, '*land which will be benefitted by the creation and operation of the district.*' (Italics added.) (See Harb. & Nav. Code, §6217.) The local voters themselves declared in 1952, when the District was formed, that *all* real property within the District's taxing boundaries would be benefitted by the 'creation *and* operation' of the Ventura Harbor. In light of this indisputable fact, the Legislature was completely justified in concluding

that *all* lands within a port district would be benefitted by the *continued operation* of a public improvement of this nature."

VGV's argument proves too much. If everything is special, then nothing is special. That is, the presumption that every project undertaken by a port district is equally beneficial to all of the properties within the district would effectively nullify the requirement that an assessment valuation be fixed "per acre for each parcel which is in proportion to the benefits to be derived from" the project. (Wat. Code, §51323; see Harb. & Nav. Code, §6365, subd. (d)(2).) Moreover, because of the failure of the commercial marina project, there is no means of fixing an assessment valuation per acre for each parcel in proportion to the benefits to be derived from the "continuance in operation" of the project as required by Water Code section 51323.

Finally, VGV repudiates a bedrock requirement of article XIII D--that the owners of property upon which an agency proposes to levy an assessment be given a right to vote on it. (Art. XIII D, §4.) The reason VGV cannot concede the voter approval requirement is not far to seek. "One thing on which the District, the County and VGV agree is that if Proposition 13 and Proposition 218 are interpreted to require [voter approval] before taxes or assessments can be levied to pay the judgment, it will not be paid. As VGV acknowledged in petitioner's brief on the merits . . .: 'All those entitled to vote on whether the judgment will be paid will benefit by lower taxes if they vote to deprive the judgment creditor of recovery on his judgment.' "

VGV argues that, by providing in Harbors and Navigations Code section 6365, subdivision (d)(2) that

assessments may be levied for the "satisfaction of liabilities arising from projects," the Legislature "must have thought that prompt payment of debts does in fact confer a special benefit on the lands within the district." VGV's argument misses the point. Under article XIII D, that a proposed improvement would confer special benefits upon the landowners within a district is a necessary condition for the levying of a special assessment, but it is not a sufficient one. That is, even if the payment of the district's debt would confer special benefits on the properties within the district, the property owners would still have the right to vote on the question whether they wished to obtain the special benefits by paying the debt. Proposition 218 was quite clear about the fact that its provisions were to be "liberally construed to effectuate its purposes of limiting local government revenue and *enhancing taxpayer consent*." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 5, p. 109, italics added, and reprinted in Historical Notes, 2A West's Ann. Cal. Const. (2001 supp.) foll. art. XIII C, p. 33.)

In conclusion, we answer the second of the questions certified by the Ninth Circuit as follows: A port district created pursuant to Harbors and Navigation Code section 6210 does have independent authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it, *so long as the assessments satisfy the applicable statutory and constitutional requirements*. However, this port district may not impose an assessment to raise the funds to satisfy the judgment in question here because the assessment would not *specially benefit* the parcels upon which it would be imposed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Werdegar, J., and Chin, J., concurred.

Appellant's petition for a rehearing was denied March 28, 2001.

APPENDIX F

S080112

IN THE SUPREME COURT OF CALIFORNIA

[Filed, October 20, 1999]

VENTURA GROUP VENTURES, INC., Appellant	)
v.	)
VENTURA PORT DISTRICT et al., Appellants	)

The request for certification directed to this court from the United States Court of Appeals for the Ninth Circuit is accepted.

For purposes of briefing and oral argument, federal district court plaintiff Ventura Group Ventures, Inc., is deemed petitioner to this court.

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Chin
Associate Justice

Brown
Associate Justice

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 97-55269

[Filed, June 28, 1999]

VENTURA GROUP VENTURES, INC.,
Plaintiff-Appellant,

v.

VENTURA PORT DISTRICT; VENTURA PORT DISTRICT PUBLIC FACILITIES CORPORATION; VENTURA PORT DISTRICT PUBLIC IMPROVEMENT CORPORATION; THE BOARD OF PORT COMMISSIONERS OF VENTURA PORT DISTRICT; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Merchants Bank, Kansas City Missouri, LYW Ventura Harborview Limited Partnership and Great Western Bank; BOARD OF SUPERVISORS, of Ventura County,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-94-03262-HLH
Harry L. Hupp, District Judge, Presiding.

JUDGES:
Before: James R. Browning, Sidney R. Thomas and Kim McLane Wardlaw, Circuit Judges.

ORDER

We certify the following questions to the Supreme Court of California as set forth in the attached request:

1. Does Article XIII A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the one percent limit, pursuant to California Harbors and Navigation Code §6361 to pay a money judgment as required by California Government Code §§970-971?

2. Does a port district created pursuant to California Harbors and Navigation Code §6210 have independent authority to impose assessments under California Harbors and Navigation Code §6365(d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?

We stay all further proceedings in this case in this court and the district court pending receipt of the answers to the certified questions. If the Supreme Court of California declines certification, we will resolve the issues according to our perception of California law.

The Clerk of the Court is hereby directed to transmit forthwith, under the official seal of the Ninth Circuit, a copy of this order, the attached Request for Certification, and copies of all briefs and excerpts of record submitted to this

court to the Supreme Court of California. This case is withdrawn from submission until further order of the court.

REQUEST FOR CERTIFICATION DIRECTED TO THE SUPREME COURT OF CALIFORNIA

Pursuant to Rule 29.5 of the California Rules of Court, a panel of the United States Court of Appeals for the Ninth Circuit, before which this appeal is pending, hereby certifies to the Supreme Court of California questions of law concerning the interplay of Article XIII A of the California Constitution and California's statutory writ of mandate providing for the payment of judgments by local public entities. The California courts provide no controlling precedent on this question. The answers to the certified questions will be determinative of a part of this appeal. We respectfully request that the Supreme Court of California answer the certified questions presented below. Our phrasing of the issues should not restrict the Court's consideration of the issues.

I. *Caption of the Case*

Ventura Group Ventures, Inc., is deemed the petitioner in this request because it is appealing the district court's ruling on this issue. The caption of the case is:

> VENTURA GROUP VENTURES, INC., Plaintiff-Appellant, v. VENTURA PORT DISTRICT; VENTURA PORT DISTRICT PUBLIC FACILITIES CORPORATION; VENTURA PORT DISTRICT PUBLIC IMPROVEMENT CORPORATION; THE

BOARD OF PORT COMMISSIONERS OF VENTURA PORT DISTRICT; FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Merchants Bank, Kansas City Missouri, LYW Ventura Harborview Limited Partnership and Great Western Bank; BOARD OF SUPERVISORS OF VENTURA COUNTY, Defendants-Appellees.

Counsel for the parties are as follows:

For Ventura Group Ventures: John R. Robinson and Carol J. Covington; Heily & Blase; 594 Poli Street; Ventura, California; 93001-2633; telephone: (805) 667-4970

For Ventura Port District: H. Jess Senecal and Thomas S. Bunn III; Lagerlof, Senecal, Bradley, Gosney & Kruse, LLP; 301 North Lake Avenue, Tenth Floor; Pasadena, California; 91101; telephone: (626) 793-9400

For Board of Supervisors of Ventura County: James L. McBride, Lawrence M. Matheney, and Robert R. Orellana; Office of County Counsel; 800 South Victoria Avenue; Ventura, California; 93009-1830; telephone: (805) 654-2579.

II. *Questions of Law to be Answered*

1. Does Article XIII A of the California Constitution (adopted in 1978 by statewide initiative as Proposition 13) prohibit a county from levying property taxes, in excess of the one percent limit, pursuant to California Harbors and Navigation Code §6361 to pay a money

judgment as required by California Government Code §§970-971?

2. Does a port district created pursuant to California Harbors and Navigation Code §6210 have independent authority to impose assessments under California Harbors and Navigation Code §6365(d)(2) in order to raise the funds needed to satisfy a judgment obtained against it?

III. *Statement of Facts*

Ventura Port District ("the District") was organized by the County of Ventura in 1952 as a local governmental entity to operate and develop the Ventura Harbor in Ventura County, California. The District was created pursuant to California Harbors and Navigation Code §6210. *See* Cal. Harb. & Nav. Code §6210. The District is governed by a board of port commissioners pursuant to section 6240. *See id.* §6240.

In 1979, the District leased real property along the harbor to Ocean Services Corporation ("Ocean"), a corporation that had agreed to develop a commercial marina on the harborfront property. The District, however, failed to disclose a restrictive covenant on the property that prohibited the commercial development of part of the property for ten years. Once Ocean learned of the covenant, the District provided repeated assurances that the covenant would be removed quickly and at the District's expense. Ocean continued to plan the project, obtained the necessary licensing, preleased the property, guaranteed the loan payments for the necessary financing, and expended a large amount of money and effort to complete the development

project.

Meanwhile, the owners of the restrictive covenant filed a lawsuit against the District and Ocean to enjoin the development of the project. In 1981, the owners successfully obtained a preliminary injunction. In 1982, Ocean informed the District that its losses on the project had reached $ 1.8 million due to the injunction. In 1983, the parties settled the restrictive covenant lawsuit, but the District refused to renegotiate Ocean's lease or cover any of Ocean's losses.

In January 1984, Ocean filed a lawsuit in California Superior Court for Ventura County against the District for breach of contract, deceit, and promissory estoppel. The parties continued to have difficulties with the terms of the lease and with the development of the property. In 1987, Ocean filed for reorganization under Chapter 11. The District secured an order from the bankruptcy court declaring that the lease between the District and Ocean had been rejected, and then evicted Ocean from the property and took control of the marina facilities. In 1988, Ocean converted the bankruptcy proceeding to Chapter 7, but the court permitted Ocean and its creditors to continue to pursue the lawsuit against the District.

At trial, Ocean argued that the District had breached the implied covenant of quiet enjoyment and the implied covenant of good faith and fair dealing. On September 25, 1990, a jury awarded Ocean $ 31,352,595, which the trial judge later reduced to $ 16,971,767.

In 1991, Ocean recorded an abstract of judgment against the District. Ocean believed that its abstract of

judgment created a judgment lien against the District and secured creditor status for itself. At the same time, the District recorded an "Extinguishment of Lien." The District then encumbered a portion of its real property in a series of transactions, one of which resulted in the District's giving a deed of trust against some of its property to Merchants Bank of Kansas City.

In April 1990 and pursuant to Ocean's Chapter 7 proceeding, Ocean sold and assigned its cause of action against the District to a new corporation formed by Ocean's former shareholders, Ventura Group Ventures ("VGV"), the appellant herein. In May 1993, a California appellate court affirmed VGV's verdict, *see Ocean Servs. Corp. v. Ventura Port Dist.*, 15 Cal. App. 4th 1762, 1782 (Ct. App. 1993), but in an unpublished portion of the decision, reduced the award to $ 15,560,169, plus costs and interest.

On August 20, 1997, VGV filed the instant action in California Superior Court for the County of Ventura to enforce the judgment. VGV sued the District, the County of Ventura, Merchants Bank of Kansas City, and other parties that VGV believed would contest the priority of VGV's judgment against the District. First, VGV sought a declaratory judgment that the District and the County were required under state law to pay the judgment either by selling property or levying additional taxes or assessments, or that in the alternative, VGV could execute against the District's property. Second, VGV asked for a writ of mandate against the District and the County in the amount of the judgment. VGV included a claim for slander of title against the individual attorneys for filing the Extinguishment of Lien. VGV also sought a determination that its abstract of judgment

gave it priority over the District's other creditors.

Immediately thereafter, the District filed a Chapter 9 petition, and VGV's claims against the District were automatically stayed. The bankruptcy court granted VGV relief from the automatic stay, permitting VGV to go forward solely with its claim for a declaratory judgment to determine if VGV could force the District or the County of Ventura to levy a property tax in order to pay the judgment.

After VGV's complaint was filed, the Federal Deposit Insurance Corporation ("FDIC") became the receiver for Merchants Bank of Kansas City and, as a party defendant, removed the case to the U.S. District Court for the Central District of California. The district court then remanded the slander of title claims to state court. All that remained in the case was the claim for a declaratory judgment determining the rights and obligations of VGV, the District, and Ventura County regarding the payment of VGV's state court judgment, and a determination of whether an abstract of judgment against a public entity could create a judgment lien giving VGV priority over the District's other creditors.

In January 1997, pursuant to its grant of summary judgment to Ventura County and its final judgment after a bench trial, the district court held that: (1) Proposition 13 prohibited the County from levying an additional property tax to satisfy VGV's judgment, (2) Proposition 13 and California Revenue and Taxation Code §95 prohibited the County from reallocating revenue generated from permissible property taxes to satisfy the judgment, (3) the District could not levy a special assessment to satisfy VGV's judgment, (4) VGV could not proceed with a writ of execution against the

District's property, (5) VGV's abstract of judgment did not create a judgment lien for the purpose of establishing VGV's priority, and (6) the other creditors had superior liens to VGV.

The district court did hold that VGV could obtain a writ of mandate against the District for the purpose of satisfying the judgment, and that a court considering the issuance of the writ could order the District to sell some of its property to satisfy the judgment. The District did not cross-appeal this determination. VGV limited its Ninth Circuit appeal to the consideration of the first three issues listed in the preceding paragraph along with federal constitutional claims and agreed to dismiss its appeal as to all defendants except the District and the County.

In April 1998, the Chapter 9 bankruptcy court approved the District's modified plan of debt adjustment. As part of the plan, VGV received $7,739,821.23 pursuant to its unsecured status. Although the bankruptcy court noted the district court's determination against VGV, the modified plan provided that VGV retained the right to pursue its appeal of the district court's judgment in the Ninth Circuit. If the appeal is successful, the bankruptcy court stated:

> The District will levy the tax as directed by the Ninth Circuit, or, if the subject proceedings are remanded, by the District Court so that the tax will be included in the real property tax bills issued by the Ventura County Tax Collector. If and when such taxes are collected by the County of Ventura and remitted to the District, the District shall distribute the funds

as required by applicable law or order of court.

On December 10, 1998, the Chapter 9 proceeding was closed.

IV. *The Need for Certification*

The salient issues in this case are ones purely of state law. The parties contend, and this panel agrees, that resolution of those issues will have a substantial effect on California law and the citizens of California. Accordingly, principles of comity suggest that those decisions should be made by California courts.

In addition, the answers to the certified questions will resolve the critical question in this case as to whether the Port District or the County of Ventura can be ordered to levy property taxes under California Harbors and Navigation Code §6361 or §6365(d)(2) to satisfy VGV's money judgment or whether Article XIII A of the California Constitution prevents the County or the District from levying property taxes to satisfy VGV's judgment based on the breach of implied covenants.

All claims for money or damages against a port district, such as the Ventura Port District, are governed by California Government Code §900 *et seq*. *See* Cal. Harb. & Nav. Code §6370. California Government Code §970.2 states: "A local public entity shall pay any judgment in the manner provided in this article." Cal. Gov't Code §970.2. "A writ of mandate is an appropriate remedy to compel a local public entity to perform any act required by this article." *Id.*

Section 970.4 directs the local public entity to pay the money judgment in the year it becomes final to the extent that funds are available, *see id.* §970.4, but if the local public entity cannot do so, section 970.5 requires the local public entity to pay the judgment in the next fiscal year, *see id.* §970.5, or in installments over the next ten years, *see id.* §970.6. The local public entity must include in its budget a provision to repay all judgments, or if the local public entity receives all or some of its funding from another local public entity, the other local public entity also must include in its budget, equal to its pro rata share, an amount sufficient to permit the local public entity to pay all money judgments. *See id.* §970.8.

Read alone, the statutory scheme provides that a court can issue a writ of mandate ordering a port district to allocate funds in its budget for the payment of a judgment. When the statutory scheme is read in conjunction with California Harbors and Navigation Code §6361, however, VGV argues that a writ of mandate can issue to order Ventura County specifically to levy taxes in the amount of the judgment. This is because, each year, the board of port commissioners must furnish to the board of commissioners of the county in which it is situated,

> An estimate in writing of the amount of money needed for all purposes by the district during the ensuing fiscal year. Thereupon, it is the duty of the board of supervisors to levy a special tax, on all taxable property of the county lying within the district, sufficient in amount to raise that sum.

Cal. Harb. & Nav. Code § 6361.

As a defense, the defendants in this case, County of Ventura and the Port District, submit that Article XIII A of the California Constitution prevents the levy of any additional taxes beyond the one percent ad valorem limit. The relevant portions of Article XIII A are:

> §1. Ad valorem tax on real property; maximum amount; application
>
> (a) The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.
>
> (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on (1) any indebtedness approved by the voters prior to July 1, 1978, or (2) any bonded indebtedness for the acquisition or improvement of real property approved on or after July 1, 1978, by two-thirds of the votes cast by the voters voting on the proposition.

Cal. Const. art. XIII A, § 1.

It is difficult to harmonize Article XIII A, California

Harbors and Navigation Code §6361, and California Government Code §§970, 971. Therefore, Article XIII A may have repealed by implication any other duty on the part of the District or the County to levy property taxes to satisfy VGV's judgment. In the absence of any case law, we would enforce Article XIII A, the constitutional provision, to the exclusion of the statutory provisions. Nonetheless, we recognize that a California court has barred application of Article XIII A when an inverse condemnation judgment was at issue. *See F & L Farm Co. v. City Council*, 65 Cal. App. 4th 1345 (Ct. App. 1998). VGV argues that *F & L Farm* should be extended to bar the enforcement of Article XIII A in this case to permit the County to satisfy its judgment by levying additional property taxes.

Related to this argument, VGV argues that Article XVI's involuntary obligation exception, discussed in *F & L Farm*, should be applied in the Article XIII A context. *See generally County of Los Angeles v. Byram,* 36 Cal. 2d 694, 227 P.2d 4 (Cal. 1951) (in bank); *Arthur v. City of Petaluma*, 175 Cal. 216, 165 P. 698 (Cal. 1917); *Lewis v. Widber,* 99 Cal. 412, 33 P. 1128 (Cal. 1893). At this time, the California courts have not extended the involuntary obligation exception of Article XVI in this manner. In addition, even if the exception were to apply in the Article XIII A context, VGV's judgment is a judgment for breach of the implied covenant of quiet enjoyment and the implied covenant of good faith and fair dealing and may not qualify as an "involuntary obligation."

The second certified question pertains to California Harbors and Navigation Code §6365(d)(2). This section provides: "Notwithstanding any other provision of law, the

district may levy and collect assessments and reassessments . . . to pay . . . for the satisfaction of liabilities arising from projects." Cal. Harb. & Nav. Code § 6365(d)(2). VGV argued before our court that this provision provides statutory authority for the District to levy additional property taxes beyond Article XIII A's one percent limit in order to satisfy the judgment. The District has argued that the provision only entitles the District to levy special assessments, the definition of which precludes a levy to satisfy a judgment.

Although we recognize that California courts generally have held that Article XIII A does not limit the levy of special assessments, *see Sinclair Paint Co. v. State Bd. of Equalization,* 15 Cal. 4th 866, 937 P.2d 1350, 1354 (Cal. 1997); *Solvang Mun. Improvement Dist. v. Board of Supervisors*, 112 Cal. App. 3d 545, 556-57, 169 Cal. Rptr. 391 (Ct. App. 1980); *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 985-86, 156 Cal. Rptr. 777 (Ct. App. 1979), we note that the courts have defined special assessments very narrowly. In *Solvang*, the court defined a special assessment as:

> [A] charge imposed on particular real property for a local public improvement of direct benefit to that property, as for example a street improvement, lighting improvement, irrigation improvement, sewer connection, drainage improvement, or flood control improvement. The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the

> few, and the few specially benefitted should not be subsidized by the general public.

112 Cal. App. 3d at 552. The California courts, however, have not specifically determined whether Article XIII A or the *Solvang* definition of a special assessment prevents the District from levying taxes to satisfy VGV's judgment under section 6365(d)(2).

Because of the obvious implications of the resolution of these issues on California state law and procedure, the panel respectfully requests the California Supreme Court to accept the certification. In addition, an answer to the certified questions is critical to the issues pending before this panel. This court agrees to follow the answers provided by the California Supreme Court.

V. *Accompanying Materials*

The Clerk of Court has been ordered to provide all relevant briefs and excerpts of record with this request and to forward all under the official seal of the Ninth Circuit pursuant to Rule 29.5(c)-(d).

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case Nos. 97-55269, 97-55272

[Filed, October 30, 1998]

VENTURA GROUP VENTURES, INC.,

Plaintiff/Appellant/Cross-Appellee,

v.

VENTURA PORT DISTRICT,

Defendant/Appellee/Cross-Appellant,

and

THE BOARD OF PORT COMMISSIONERS OF VENTURA PORT DISTRICT; et al.,

Defendants/Appellees.

ORDER

Pursuant to the stipulation of the parties, appeal no. 97-55272 is dismissed. Fed. R. App. P. 42(b). The parties

shall bear their own costs on appeal.

A certified copy of this order shall serve as the mandate of this court.

Pursuant to the stipulation of the parties, appeal no. 97-55269 shall be dismissed as to appellees Federal Deposit Insurance Corporation as receiver for Merchants Bank of Kansas City, LYW Ventura Harborview LTD and Great Western Bank (now Washington Mutual) only and shall proceed as against appellees Ventura Port District, the Board of Supervisors of Ventura County, et al. but limited to the following issues:

1. Whether Article XIII A of the California Constitution (adopted by statewide initiative as Proposition 13 in 1978) was intended to prohibit the County of Ventura from performing its mandatory obligation to levy *additional* property taxes on behalf of the Port District under Harbors and Navigation Code section 6361 to allow the Port District to budget for and pay a judgment as mandated by Government Code sections 970-971;

2. If so, can the statewide electorate, by adopting Proposition 13, override statutes enacted by the State Legislature that mandate that additional taxes be levied to pay a final judgment against a local public entity, or would such action by the electors be incompatible with the United States Constitution's guarantee of a republican form of government and/or does an application or Article XIII A that effectively allows a one-third minority of the local electorate to decide whether a judgment issued by the state judiciary enforcing state laws will or will not be paid also

violate the separation of powers doctrine and deprive the judgment creditor of property without due process of law.

3. If Article XIII A can be constitutionally applied to prohibit the County of Ventura from levying *additional* property taxes to pay the judgment, was the Port District entitled to receive and was the County required to disburse from the 1% countywide levy allowed by Article XIII A the funds the Port District required to satisfy the judgment, or do the statutory allocation provisions of Revenue and Taxation Code section 93, et *seq.* limit the amount of the 1% levy the County could disburse to the Port District to satisfy the judgment, although Government Code section 971 provides that any *statutory* limitation on the amount of taxes that may be levied by a local public entity does not apply to taxes collected to pay a judgment arising from a nondiscretionary act.

4. Did the District Court err in finding that the Port District did not have independent authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d) (2) in order to raise the funds needed to satisfy the judgment despite the language of that section which specifically allows for the levy and collection of assessments for the satisfaction of liabilities arising from projects such as the one that led to the judgment in the case at bar.

FOR THE COURT:

_____

Margaret Corrigan
Circuit Mediator

APPENDIX I

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UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA

Case No. ND 93-12918-RR
Chapter 9
[Filed, September 20, 1998]

In re	)
VENTURA PORT DISTRICT,	)
Debtor.	)
	)

MODIFIED ORDER CONFIRMING AMENDED PLAN OF DEBT ADJUSTMENT (OCTOBER 1, 1997), AS MODIFIED

The "Amended Plan of Debt Adjustment (October 1, 1997)" (the "Plan") filed by Ventura Port District (the "District") on October 31, 1997, as modified pursuant to the "Non-Material Modification to Amended Plan of Debt Adjustment (October 1, 1997) and Notice Thereof" (the "Modification") filed by the District on January 5, 1998 (together the Plan and the Modification constitute the "Modified Plan"), was considered by the Court at evidentiary hearings conducted on January 14, 15, and 16, 1998, and March 9, 1998. At a hearing held on March 10, 1998, the Court announced its decision in this matter. Appearing at the hearings on behalf of the District were Irving Sulmeyer and David S. Kupetz of Sulmeyer, Kupetz, Baumann & Rothman, a professional corporation. Jay L. Michaelson and Joseph Sholder of Michaelson, Susi & Michaelson and John R. Johnson of Heily & Blase appeared at the hearings on behalf of Ventura Group Ventures, Inc. ("VGV") . All other appearances are reflected in the record. VGV was the only party to file an objection to confirmation of the Modified Plan.

On April 9, 1998, this Court's order (the "Prior Order") confirming the Modified Plan was entered. VGV filed a timely appeal from the Prior Order. Thereafter, VGV and the District resolved their dispute; VGV tendered its consent to the Modified Plan and to confirmation thereof in the Prior Order as modified by this Order; and VGV's appeal was withdrawn and the proceedings remanded for further action by this Court with respect to the Modified Plan. As

contemplated in the Modified Plan, the District has sold Revenue Bonds (as that term is defined in the Modified Plan) to provide funding for the Modified Plan.

Based on the foregoing, the Court having determined that the requirements for confirmation set forth in 11 U.S.C. § 943 b) have been satisfied in accordance with the Court's Findings of Fact and Conclusions of Law entered in conjunction with the Prior Order as modified below, and good cause appearing therefor,

IT IS ORDERED that the Prior Order is hereby amended and restated in its entirety by this Order, that any provisions of the Prior Order inconsistent with the terms of this Order are hereby superseded by this Order and, except as to the extent modified by the terms of this Order, the Prior Order is and shall remain in full force and effect. Further, the Court's Findings of Fact and Conclusions of Law entered in conjunction with the Prior Order remain in full force and effect, except that Findings of Fact numbers 30 and 41 are hereby vacated and are to be deemed deleted from the Findings of Fact.

IT IS FURTHER ORDERED that the Modified Plan is confirmed and that all of the terms of the Modified Plan are approved; provided however, that VGV shall retain its rights to pursue its appeal regarding the levying of property taxes to pay VGV's judgment against the District (the "Tax Appeal"), limited to issues 1 through 4 identified in VGV's January 31, 1997 Civil Docketing Statement filed with the Ninth Circuit, which is currently pending before the Ninth Circuit Court of Appeals. If VGV is successful in the Tax Appeal, the District will levy the tax as directed by the Ninth Circuit or, if the

subject proceedings are remanded, by the District Court so that the tax will be included in the real property tax bills issued by the Ventura County Tax Collector. If and when such taxes are collected by the County of Ventura and remitted to the District, the District shall distribute the funds as required by applicable law or order of court. The District is authorized to take all actions contemplated by the Modified Plan. A copy of the Plan is attached hereto as Exhibit 1. A copy of the Modification is attached hereto as Exhibit 2.

IT IS FURTHER ORDERED that the District's obligations to the holders of the Revenue Bonds are not discharged by the entry of this Order and that the Confirmation Date (as that term is defined in the Modified Plan) shall be the date of entry of the Prior Order: April 9, 1998. However, the Effective Date of the Modified Plan, as modified by this Order, shall be ten (10) days after the entry of this Order.

DATED: September 20, 1998

/s/_____
Robin L. Riblet
UNITED STATES BANKRUPTCY JUDGE

Presented By:
SULMEYER, KUPETZ, BAUMANN & ROTHMAN
and
LAGERLOF, SENECAL, BRADLEY & SWIFT

By: /s/_____
David S. Kupetz
Insolvency Counsel for Ventura Port District

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 94-3262-HLH

[Filed, January 6, 1997]

VENTURA GROUP VENTURES, INC., a corporation, Plaintiff and Petitioner,	)
v.	)
VENTURA PORT DISTRICT, etc., et al., Defendants and Respondents.	)

AMENDED JUDGEMENT

This action was tried on September 12, 13, and 14, 1995 before the Honorable Harry L. Hupp, presiding without a jury. Plaintiff Ventura Group Ventures, Inc. ("VGV") appeared by its attorneys, DeWitt F. Blase, and John R. Johnson of Heily & Blase. Defendant Ventura Port District ("Port District") appeared by its attorneys Irving Sulmeyer and Israel Saperstein of Sulmeyer, Kupetz, Baumann & Rothman and Thomas S. Bunn, III of Lagerlof, Senecal,

Bradley & Swift. Defendants Federal Deposit Insurance Corporation, as Receiver for Merchants Bank ("FDIC"), LYW Ventura Harborview 'Limited Partnership ("LYW") and Great Western Bank, a Federal Savings Bank ("Great Western") appeared by their attorneys Robert C. Braun, Kathy F. Esfahani, and Matthew K. Ross of Rutan &Tucker.

Following presentation and receipt of oral and documentary evidence and argument of counsel, the Court signed and the Clerk duly entered a Memorandum of Decision, Findings of Fact and Conclusions of Law on October 27, 1995. The Memorandum of Decision in turn incorporated the following prior interlocutory orders: (1) the Order entered September 12, 1994 on FDIC's Motion for Judgment on the pleadings, (2) the Order entered February 27, 1995 on the Motion for Partial Summary Judgment filed by FDIC, Great Western and LYW and the Motion for Partial Summary Judgment filed by VGV, and (3) the Order entered August 2, 1995 on the Motion for Summary Judgement filed by defendant Board of Supervisors. The court subsequently modified its Memorandum of Decision in accordance with its Order entered November 13, 1995 granting the Port District's Motion for Reconsideration, in which FDIC, Great Western and LYW joined. The Court granted, the Motion for Partial Summary Judgment filed by the Supervisors of the County of Ventura (the "County of Ventura") and an Amended Summary Judgment was entered October 11, 1995 making certain findings and conclusions to be incorporated into the final judgment.

Based on the foregoing, IT IS ORDERED, ADJUDGED, AND DECREED that

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. section 1442 (a) by virtue of the fact that the FDIC is a party and has removed this action to this court.

2. On January 31, 1991 Judgment was entered in the Superior Court County of Ventura in the Case styled Ocean Services, Corp. v. Ventura Port District, Case No. 84402 (referred to as the "VGV Judgment"). The action upon which VGV's Judgment was entered was prosecuted by VGV as assignee of the claims of Ocean Services corporation, on February 1, 1991 VGV caused to be recorded in the official records of Ventura County as Instrument-No. 91-013844 an abstract of the VGV Judgment (referred to as "VGV's Abstract of Judgment"). The VGV Judgment became final on August 19, 1993.

3. The VGV Judgment is enforceable only pursuant to article 1 of chapter 2 of Part 5 of the California Government Code, sections 970, et seq. and is not enforceable by means of writ of execution, equitable foreclosure, or judicial foreclosure. The VGV Judgment is not subject to or enforceable under any of the provisions of title 9 of Part 2 of the California Civil Procedure Code, the whole of which is inapplicable to the VGV Judgment. Recordation of the abstract created no lien against any property of the Port District, a local public entity, nor does it create any Other preference determining device.

a. The Recordation of VGV's Abstract of the Judgment does not and never did create a lien or encumbrance against any property of the Port District, a local public entity, for any purpose, including but not limited to the purpose of

establishing priority vis-a-vis subsequent liens, encumbrances, and leases. The recordation of VGV's Abstract of Judgment creates no lien which affects the rights of any of the defendants in this declaratory relief action.

b. VGV's Abstract of Judgment does not create a lien as to any current or future rental owing the Port District, the Ventura Port District Improvement corporation or the Ventura Port District Facilities Corporation. Levy, garnishment, or assignment order, all of which are enforcement mechanisms under title 9 of the California Code of Civil Procedure, are inapplicable to judgments against local public entities such as the Port District.

4. The Deed of Trust (Leasehold), Security Agreement, Assignment of Rents and Fixture Filing in favor of Merchants Bank (referred to as the "FDIC Deed of Trust"), recorded on March 17, 1992 as instrument no. 92-042949 in the official records of Ventura County has priority over and is superior to any rights created by the Abstract of Judgment because VGV's Abstract of Judgment does not create a lien against Port District property for any purpose, including but not limited to the purpose, of establishing priority vis-a-vis subsequent liens, encumbrances, and leases.

5. The Assignment of Leases and Rents (from Ventura Port District Facilities corporation to Merchants Bank) made March 4, 1992 and recorded in the official records of Ventura County as Instrument No. 92-042950 has priority over and is superior to any rights created by VGV's Abstract of Judgment because VGV's Abstract of Judgment does not create a lien against Port District property for any purpose, including but not limited to the purpose of

establishing priority vis-a-vis subsequent lien, encumbrances, and leases.

6. The Assignment of Ground Lease and Rents (from Ventura Port District to Merchants Bank) made March 4, 1992 and recorded in the official records of Ventura County as Instrument No. 92-042951 has priority over and is superior to any rights created by VGV's Abstract of Judgment because VGV's Abstract of Judgment does not create a lien against Port District Property for any purpose, including but not limited to the purpose of establishing priority vis-a-vis subsequent liens, encumbrances, and leases.

7. Great Western's Leasehold Deed of Trust dated June 24, 1993 and recorded on June 30, 1993 in the official records of Ventura County as Instrument No. 93-118728 has priority over and is superior to any rights created by VGV's Abstract of Judgment because:

a. VGV's Abstract of Judgment does not create a lien against Port District Property for any purpose, including but not limited to the purpose of establishing priority vis-a-vis subsequent liens, encumbrances, and leases.

b. Great Western's Leasehold Deed of Trust secures a purchase money loan which takes priority over any other liens or encumbrances created against the purchaser.

8. LYW's interest as lessee in the fifty-year lease entered into in January, 1993 with the Port District as lessor covering parcels 1 and 19 of the Port District property is superior to and has priority over any rights created by the Abstract of Judgment because VGV's Abstract of Judgment

does not create a lien against Port District Property for .any purpose, including but not limited to the purpose of establishing priority vis-a-vis subsequent liens, encumbrances, and leases.

9. In accordance with the Amended Summary Judgment entered October 11, 1995 it is declared that:

a. Article XIII.A. of the California Constitution prohibits the County of Ventura from levying property taxes in addition to the one percent maximum in the absence of the prior approval of a levy for the repayment of bonded indebtedness by two-thirds of the electorate.

b. Article XIII.A. of the California Constitution and california Revenue and Taxation Code section 95 et seq., prohibits the reallocation of the allowable one percent levy of property taxes for the purpose of satisfying the VGV Judgment against the Port District.

c. VGV does not have any right to compel either the County of Ventura to increase any property tax(es) for the purpose of satisfying the subject judgment.

10. Neither the Port District nor the County of Ventura has the authority, under California Harbors and Navigation Code section 6362 or otherwise, to levy ad valorem taxes in excess of the 1% limitation imposed by Article XIII.A, section 1 of the California Constitution, to pay the judgment.

11. The Port District's annual share of the 1% countywide property tax levy is fixed by California Revenue

and Taxation Code section 93 et seq. and not by California Government Code section 971 and cannot be reallocated for the purpose of satisfying the VGV Judgment.

a. The Ventura Port District is a special district formed under the California Harbors and Navigation Code section 6200 et seq for the purpose of developing harbor facilities at Ventura.

b. The Port District is a "special district" within the meaning of California Revenue and Taxation code section 95 for sharing in property tax revenues allowed to be raised under Article XIII.A of the California Constitution.

12. The Port District does not have the power to levy special assessments to raise revenue to pay the VGV Judgment.

a. The Port District is not authorized under California Harbors and Navigation Code section 6365(d) to levy a special assessment to pay the VGV Judgment.

b. The power to levy special assessments that was given to the Port District in 1990 under California Harbors and Navigation Code section 6365(d) does not authorize the Port District to levy a special assessment to pay the VGV Judgment

13. The Port District had a duty to adopt a budget that provided for payment of the VGV Judgment in

accordance with California Government Code sections 970.4 through 970.8, and performance of this duty could be compelled by writ of mandate.

14. The duties imposed upon a local public entity under California Government Code section 970 et seq. are mandatory, not discretionary. The public entity must take the steps necessary to pay the judgment. The duties imposed upon a local public entity under California Government Code section 970 et seq. may be enforced by writ of mandate under Government Code section 970.2 by a court with requisite jurisdiction.

a. A court considering a writ of mandate under Government Code section 970 et seq. would of necessity have the power to consider all of the possibilities, including diversion of revenue or sale of property, in determining how the Port District is to perform its duty to pay the VGV Judgment. The statutory scheme provided by Government Code section 970 et seq. gives a mandate court with requisite jurisdiction plenary power to make such orders as are necessary to cause the judgment to be paid. California law provides no artificial limitation on the steps that a court considering issuance of a writ of mandate might take to require the Port District to perform its ministerialduty under California Law.

b. A court considering a writ of mandate under California Government Code section 970.2 of necessity has the power to order that Port District Property be sold or that Port District revenues and funds be applied to the payment of the VGV Judgment. Any sale of Port District property or diversion of revenue compelled by writ of

mandate would be subject to the lien priorities establishedby this Judgment.

c. A court considering issuance of a writ of mandate would have to consider the revenues of the Port District, the nature and value of property owned by the Port District, and the Port District's significant obligations dealing with maintenance and protection of Port District Property, policing of the Port District, and dredging the harbor entrance and inner harbor.

15. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly determines that this declaratory judgment on the first claim for relief in the above captioned action be entered as a final Judgment forthwith, and that there is no just reason to delay its entry even though other claims for relief might still be pending in this action previously remanded to the California Superior Court for the County of Ventura.

Plaintiff and Ventura Port District shall each bear their own costs vis-a-vis each other.

Defendants FDIC, Great Western Bank, and LYW are awarded their costs of suit in the sum of $_____.

The County of Ventura shall recover its costs in the sum of $_____.

DATED: January 6, 1997

/s/_____
Harry L. Hupp

UNITED STATES DISTRICT JUDGE

Submitted By:

SULMEYER, KUPETZ, BAUMANN & ROTHMAN
Irving Sulmeyer
Israel Saperstein
David S. Kupetz

Dated: November 27, 1996

By: /s/_____
Israel Saperstein
Attorneys for Defendant and Respondent
VENTURA PORT DISTRICT

DECLARATION OF SERVICE BY MAIL

I ANNEE L. STROMBERG, the undersigned declare:

1. I am a citizen of the United States, over the age of 18 years and not a party to the within action. On November 27, 1996, at the direction of Israel Saperstein, a member of the Bar of this Court, and as an employee of the law firm of Sulmeyer, Kupetz, Baumann & Rothman, a Professional Corporation, 300 South Grand Avenue, 14th Floor, Los Angeles, California 90071, I served the within: AMENDED JUDGMENT on the interested parties in this matter by mailing, with postage thereon fully prepaid, a true copy thereof to said party(ies) at his/her (their or its) known address, as follows: SEE ATTACHED SERVICE LIST.

I am familiar with the business practice of Sulmeyer, Kupetz, Baumann & Rothman in regards to collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the orordinary course of business. I know the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Los Angeles, California. I declare under penalty .of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed November 27, 1996, at Los Angeles, California.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed November 27, 1996, at Los Angeles, California.

/s/_____
Anne L. Stromberg,
Declarant

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APPENDIX K

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

No. B057637

[Decided, May 25, 1993]

OCEAN SERVICES CORPORATION,
Plaintiff and Appellant,

v.

VENTURA PORT DISTRICT,
Defendant and Appellant.

On Appeal from
Superior Court of Ventura County
No. 84402
Robert J. Soares, Judge*

* Retired judge of the Ventura Superior Court sitting under assignment by the Chairperson of the Judicial Council.

JUDGES:
Opinion by Gilbert, J., with Stone S. J., P. J., and Yegan, J., concurring.

OPINION

An action is brought against a governmental entity. The governmental entity asserts as a defense the party's failure to comply with the governmental claims statute. We hold, among other things, that through its conduct a governmental entity may be estopped from asserting failure to comply with the claims statute.

We also hold the governmental entity breached a covenant of good faith and fair dealing.

In addition, the five-year mandatory dismissal statute was tolled.

Ventura Port District (VPD) appeals from a $16,971,767 judgment in favor of respondent, Ocean Services Corporation (OSC), and an order denying its motion for judgment notwithstanding the verdict. We affirm.*

FACTS

VPD was established in 1952 to operate and develop the Ventura Harbor, a small coastal harbor consisting of 24 parcels and 189 acres of land and water. During the first 25 years of its existence, it lacked the necessary capital to develop a commercial marina. In 1977 VPD hired Gerald Barney to act as the port district general manager and to create a comprehensive development plan.

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* See footnote, *ante*, page 1762.

Barney devised a plan to lease sections of the harbor for commercial development. In 1979 he offered OSC an option to lease three parcels, 3A, 3C and 5, in order to develop a commercial marina with restaurants and retail shops. The option agreement gave OSC the right to lease the property for 50 years. During the lease term it would share the rents and profits with VPD. Barney described the project as "a joint venture between private enterprise and the Port District."

The first phase of the project required that OSC construct a commercial fishing and wharf facility on parcel 3A and a marine science building on parcel 5. OSC did not expect a profit from this phase because the property was dedicated for public use. OSC could recoup its investment during the second phase of the project by constructing restaurant and retail facilities on parcel 3C. Everyone involved with the development recognized that the financial success of the entire project depended on parcel 3C.

When OSC executed the option to lease agreement on October 1, 1979, VPD failed to disclose that parcel 3C was burdened by a restrictive covenant. The restrictive covenant was in favor of STH Development Company (STH). VPD and STH had previously entered into a lease agreement to develop the other side of the harbor. In that agreement VPD had covenanted that no restaurant or retail facilities would be built on parcels 3C and 5 for 10 years.

After the option agreement was signed, OSC received a preliminary title report that made a general reference to the STH lease. Edward Jenks, president of OSC, asked Barney about the lease. Barney told him that it had been terminated,

and assured him that VPD would talk to the title company and have the matter straightened out.

OSC proceeded with the project and, pursuant to the option agreement, exercised "due diligence" by expending $ 1.5 million for permit fees and engineering services. VPD approved the preliminary plans on February 20, 1980, but failed to mention that STH's assignee and lender, Marina Cabrillo and Mitsui Manufacturers Bank, had filed two actions in the Los Angeles County Superior Court to enforce the restrictive covenant. On February 22, 1980, the Marina Cabrillo plaintiffs amended their complaint to allege that OSC's project violated the restrictive covenant.

Barney finally disclosed the problem in March 1980 and told Jenks the matter would be quickly resolved. He assured OSC that parcel 3C could still be developed and that VPD would stand by its promise. VPD, nevertheless, was concerned about the litigation and asked that no retail or restaurant facilities be built on parcel 5 until the restrictive covenant was removed. Because of Barney's assurances, OSC continued with the project and pre-leased 97 percent of the parcel 3C facilities.

Jenks later discovered that construction lenders were reluctant to fund the project because of the restrictive covenant. The parties agreed to extend the option period 18 months. In a letter dated September 17, 1980, Barney, on behalf of VPD, admitted that the restrictive covenants were cause for concern. He pointed out that the parties seemed to be working in a " 'gray area,' " that was not covered in the respective options or leases. In another letter, also dated

September 17, 1980, Barney informed OSC that VPD was trying to settle the matter, and suggested that they develop "mutually satisfactory contingency plans in the event the matter is not resolved to the satisfaction of potential lenders."

Weeks later, the Economic Development Administration advised VPD that the delay would cause it to lose a $ 1.3 million grant for the parcel 3A facilities. Barney urged OSC to proceed with the project because of their understanding that VPD would take care of the restrictive covenant. Jenks agreed. OSC had already attended 49 public hearings and 1,200 meetings to obtain the necessary permits.

On November 19, 1980, the parties executed the ground leases for parcels 3A, 3C and 5. The parcel 3C lease made no mention of the restrictive covenant and expressly warranted that the property could be used for restaurant and retail purposes. Having salvaged the $1.3 million federal grant, OSC used the funds to build the commercial fishing facility.

The next phase of the development required that the parties obtain tax- exempt financing for the wharf facilities, a marine center, and a quay. OSC intended to obtain private financing for three other quays on parcel 3C, known as Fisherman's Quays 2, 3, and 4. The quays were two-story structures with ocean view offices and ground floor space for three restaurants and twenty-one retail shops.

VPD devised a plan to finance construction of the wharf facilities with a 10-year, $ 9.5 million tax-exempt bond offering through the Municipal Funding Corporation of America (MUFCOA). VPD hired Brown & Caldwell, a

major engineering and project consultant firm, to prepare a financial feasibility study for the bond offering. The report stated that the project was worth $ 30 million and at least 50 percent of the project revenues would come from the parcel 3C restaurant and retail operations.

In July 1981, the underwriter concluded that the bond offering would not sell unless OSC guaranteed the loan payments. OSC declined to sign the loan documents because it had no source of income until parcel 3C was built out.

Jenks was concerned about the project because the STH plaintiffs were seeking a preliminary injunction to enforce the restrictive covenant. Barney urged Jenks to go forward with the financing because of their understanding that VPD would assume responsibility for losses caused by the restrictive covenant.

Jenks wanted written assurance. Barney consulted with VPD's board of directors and gave OSC a letter on July 10, 1981, acknowledging that the restrictive covenant was VPD's problem. The letter stated that ". . . there are too many variables to allow a firm agreement at this time between OSC and VPD in the event OSC is unable to proceed due to the covenant or any litigation surrounding it. [P] If it is acceptable to OSC, the Port District would prefer to continue with the lease purchase financing with the understanding that in the event OSC cannot proceed due to the covenant that we will negotiate towards a modification of the ground lease at that time when the facts are established."

Because of the letter, and Barney's verbal assurances, OSC signed the MUFCOA loan documents on July 15, 1981.

Parcel 3A was pledged as security in a sale-leaseback agreement between VPD and the MUFCOA trustee. OSC, in turn, executed a sublease and agreed to pay VPD $1.7 million per year for 10 years. The payments would be used to service the MUFCOA loan subject to the condition that OSC could keep $1.4 million of the loan funds in an interest bearing account.

OSC started construction after the loan documents were signed. On September 8, 1981, Mitsui Manufacturers Bank, a coplaintiff in the Los Angeles action, obtained a preliminary injunction enjoining VPD and its agents from violating the restrictive covenant. OSC stopped construction on the retail and restaurant improvements but completed the remainder of the wharf facility.

On July 6, 1982, Jenks sent a letter to Barney concerning OSC's project losses. The letter confirmed that the parties would amicably settle the matter after the restrictive covenant was removed and OSC's total losses were known. Barney testified that OSC and VPD were "[v]ery cooperative. . . . [T]he principle I was operating under was no matter what the agreement said, if the two parties are working together, we could probably solve all the problems. And if the two parties couldn't work together, no amount of paper in the agreement was going to solve the problem."

In fact it came to pass that the parties could not work together. This happened when VPD terminated Barney and hired Richard Parsons to oversee the project and to act as the new port district manager. On November 15, 1982, Jenks wrote to Parsons and advised him that OSC's losses would approach $1.8 million. Parsons asked for more data because

VPD's attorneys wanted to use the information to settle the Los Angeles action.

The STH plaintiffs settled for $1 million in December 1983. Several days after the settlement, VPD refused to renegotiate OSC's lease or assume responsibility for the losses caused by the restrictive covenant.

On January 3, 1984, OSC served on VPD an "Amendment to Claim and Claim" for damages. On January 20, 1984, VPD rejected this claim. On July 18, 1984, OSC filed the instant action for breach of contract, deceit, and promissory estoppel.

After the action was filed, VPD reinterpreted the lease. It increased the rent and changed the rent schedules. In 1985 Parsons demanded that OSC repair the rock revetment and common walkway areas. OSC refused to do so because the ground lease required VPD to pay for the repairs. Parsons later met with Jenks and told him, "I don't give a damn what the lease says."

On July 17, 1985, Parsons publicly announced that OSC was in default and could lose the entire project. OSC's lender, Great Western Savings, refused to refinance the parcel 3C improvements until the problem was straightened out. Having no choice in the matter, OSC paid $47,853 to cure the alleged default and agreed to the lease changes.

Thereafter, the harbor was not a safe one for OSC. It suffered other setbacks. In late 1984 a winter storm created a sand shoal at the harbor entrance. OSC asked VPD to remedy the problem because the shoal was a hazard to

commercial fisherman and boaters using the marina. VPD obtained an emergency dredging permit, hired the Army Corps of Engineers to dredge the harbor, and allowed the dredging spoils to be dumped next to the project. VPD's contractors later bulldozed the spoils into a 25- to 30- foot-high sand berm that ran the length of the leasehold's ocean view.

OSC complained about the condition because it blocked the ocean view and caused sand to blow into the buildings, boats, and cars. On January 15, 1985, it demanded that the sand berm be removed. Instead, VPD planted the area, installed an irrigation system, and made the sand berm a permanent fixture.

OSC's project losses continued to mount when it was unable to sublet parcel 3C or to get VPD to approve rent increases. Strapped for cash, it depleted the $ 1.4 million reserve account.

On February 9, 1987, OSC sought a chapter 11 reorganization after sustaining substantial operating losses. VPD appeared in the bankruptcy proceeding and filed a creditor's claim for breach of the ground lease and sublease purchase agreement. VPD took control of the marina facilities after OSC was evicted. On December 15, 1988, the bankruptcy action was converted to a chapter 7 liquidation. OSC and its creditors were authorized by the bankruptcy court to prosecute the instant action.

THE TRIAL

OSC proceeded to trial on the theory that VPD

breached an implied covenant of quiet enjoyment when it failed to deliver parcel 3C free and clear of the restrictive covenant. It also claimed that VPD breached an implied covenant of good faith and fair dealing, thereby causing OSC to lose the entire project.

VPD denied liability and unsuccessfully moved for dismissal on the ground the action was barred by the claims presentation statute. (Gov. Code,[1] §910 et seq.) During the 19-day trial, VPD contended that OSC waived the contractual breach when it signed the ground lease and MUFCOA sublease purchase agreement. According to VPD, the project failed because of adverse market conditions, excessive loan and operating costs, and OSC's mismanagement.

The jury returned a special verdict for $31,352,595 and found that OSC suffered $1.5 million damages when VPD breached the option to purchase agreement. It also found that the restrictive covenant caused OSC to lose $1,996,807 in rental income, $1,472,339 increased construction costs, and $1,873,098 in interest from the MUFCOA reserve account.

Following the verdict, the trial court ruled on an $ 11 million setoff claim, representing the balance owed on the ground lease and sublease purchase agreement. It denied the setoff and held that VPD was equitably estopped from asserting the setoff. The trial court further ruled that the setoff issue was moot because the jury instructions directed the jury to consider only OSC's net losses.

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[1] Unless otherwise stated, all statutory references are to the Government Code.

VPD thereafter sought a new trial and judgment notwithstanding the verdict. The trial court denied the motion for new trial subject to the condition that the judgment be reduced $ 16,971,767. (Code Civ. Proc., §662.5, subd. (b).) It ruled that the $ 31 million award was excessive because no deduction had been made for the outstanding debt owed on the project. (2)(See fn. 2.) OSC consented to the remittitur, out cross-appealed from the order.[2]

CONTENTIONS

VPD contends, among other things, that the judgment should be reversed because (1) the case was not brought to trial within five years of commencement of the action (Code Civ. Proc., §583.310), (2) OSC failed to make a proper statutory claim or file suit within the time periods mandated by the Tort Claims Act (§900 et seq.), (3) the terms of the lease did not, as a matter of law, support a finding that VPD breached an implied covenant of good faith and fair dealing*

DISCUSSION

FIVE-YEAR MANDATORY DISMISSAL

VPD argues that the trial court abused its discretion when it denied a pretrial motion for a five-year mandatory dismissal. (Code Civ. Proc., §583.310, 583.360.) Code of

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[2] Such a cross-appeal is permitted. (See *Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 341- 345 [126 Cal.Rptr. 731].)

* See footnote, *ante*, page 1762.

Civil Procedure section 583.340 tolls the five-year statute if (a) the trial court's jurisdiction was suspended, (b) stayed, or (c) where it was impossible, impracticable or futile to bring the action to trial.

Here, the five-year statute was tolled by a stay order we issued in a related action to disqualify OSC's trial counsel, Dewitt Blase. (Ventura Port District v. Blase (Super. Ct. Ventura County, No. 99066).) In that action, VPD obtained a preliminary injunction enjoining Blase from representing OSC. Blase appealed from the order, and on June 16, 1988, obtained a writ of supersedeas staying the instant action against OSC. (B034845.) VPD proceeded to trial against Blase, but a judgment was rendered in favor of Blase by way of nonsuit. We vacated the stay in the instant action July 6, 1989.

A year later, VPD requested that the instant action be dismissed because the case had not been brought to trial within five years. (Code Civ. Proc., §583.310.) The trial court denied the motion, finding that the five-year statute was tolled during the stay period from June 16, 1988, to July 6, 1989. (Code Civ. Proc., §583.340, subd. (b).)

VPD contends that the trial court miscalculated the tolling period because the stay could have been vacated six months earlier. It asserts that any tolling of the five-year statute was conditioned upon OSC's "exercise of reasonable diligence." The argument is without merit.

Code of Civil Procedure section 583.340, subdivision (b), provides that the five-year period "shall be" tolled if "[p]rosecution or trial of the action was stayed or enjoined."

The statute is unconditional and is intended to have uniform application. " 'This is consistent with the treatment given other statutory excuses; it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.' (17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919.) It also is consistent with the general policy favoring trial over dismissal. (§583.130.)" (*Holland v. Dave Altman's R. V. Center* (1990) 222 Cal.App.3d 477, 484 [271 Cal.Rptr. 706].)

Here, the trial court's jurisdiction was suspended to maintain the parties' status quo. (Code Civ. Proc., §923; *Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 995 [189 Cal.Rptr. 132].) Because of the stay, VPD waited more than a year before it filed an answer to the second amended and supplemental complaint. OSC could not proceed until the stay was vacated.

The five-year statute was also tolled because the trial court lacked jurisdiction to try the action. (*Christin v. Superior Court* (1937) 9 Cal.2d 526, 533 [71 P.2d 205, 112 A.L.R. 1153].) Lack of jurisdiction is a second exception to the dismissal statute (Code Civ. Proc., §583.340, subd. (a)) and, for purposes of computing the tolling period, "plaintiff's diligence, or lack thereof, has no place in the analysis." (*Schwenke v. J & P Scott, Inc.* (1988) 205 Cal.App.3d 71, 78 [252 Cal.Rptr. 91].)

The trial court had no statutory duty to shorten the tolling period on the theory that counsel could have been more diligent in dismissing his appeal and vacating the stay order. (*Holland v. Dave Altman's R.V. Center, supra,* 222 Cal.App.3d 477, 484.) There is no showing that the trial

court abused its discretion. (*Danielson v. ITT Industrial Credit Co.* (1988) 199 Cal.App.3d 645, 651 [245 Cal.Rptr. 126].)

As OSC pointed out in oral argument, *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790 [13 Cal.Rptr.2d 678], illustrates the principle involved here. Tolling is automatic and not subject to a "reasonable diligence" restriction. (*Id.*, at pp. 1798-1799, fn. 6.)

FAILURE TO COMPLY WITH THE CLAIMS PRESENTATION REQUIREMENTS

VPD also argues that the action was barred because of OSC's failure to comply with the statutory claims provisions of section 910 et seq. Before a civil action may be brought against a public entity, a claim must first be presented to the public entity and rejected. (§945.4.) Here, the one- year claim provision of section 911.2 required that OSC submit a statutory claim before it filed suit for breach of contract. §945.4; *Voth v. Wasco Public Util. Dist.* (1976) 56 Cal.App.3d 353, 360 [128 Cal.Rptr. 608]; Cal. Government Tort Liability Practice (Cont.Ed.Bar 1992) § 6.17, p. 652.)

VPD asked the trial court to consider the claims statute, first by way of a motion to dismiss, and then by way of a motion for judgment notwithstanding the verdict. VPD brought the motion to dismiss the first day of trial. The moving papers asked the trial court to rule upon "[t]he legal issues and, to the extent they may exist, *any factual questions* as to OSC's non-compliance with the Government Code provisions . . .." (Italics added.) VPD cited *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d

702, 711 [269 Cal.Rptr. 605] for the rule that OSC had no right to a jury trial on the issue. The trial court, after reviewing the claims and pleadings, held "that the claims statutes have been . . . complied with and/or waived . . .."

VPD contends that the trial court abused its discretion but has no transcript of the proceedings. Absent a record to the contrary, the order is presumed correct and all intendments are drawn in favor of the judgment. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65, 468 P.2d 193].) We must presume that the trial court made whatever findings were necessary to sustain the ruling. *Michael U. v. Jamie B. (*1985) 39 Cal.3d 787, 792-793 [218 Cal.Rptr. 39, 705 P.2d 362].)

VPD argues that as a matter of law the claims statute barred the contract action for covenant-related losses and project losses. We disagree. According to Barney, VPD wanted to resolve OSC's damage claim without litigation and intended to do everything reasonably possible because it "created the problem, not Ocean Services . . .. [T]here was no way to know how serious it was until something reached a conclusion, therefore there was no way to deal with it in any concrete terms other than to offer our good faith to try to be reasonable and work things out as we encountered them if they were willing to go forward with the project."

The parties had exchanged letters concerning the restrictive covenant as far back as 1980. Barney's July 1981 letter memorialized an agreement to extend the period for final action on OSC's claim until the Los Angeles action was resolved. Barney stressed that the parties develop mutually satisfactory contingency plans to resolve the issue.

In July and November of 1982 the parties exchanged further correspondence confirming their prior agreement to settle OSC's claim after the restrictive covenant was removed. A letter from OSC to Parsons on November 15, 1982, advised VPD that OSC's losses would approach $1.8 million. VPD told OSC to wait and provide additional data. It did.

We conclude that VPD waived the requirements of the claims statute and was estopped from asserting that the January 1984 claim was untimely. (*Driscoll v. City of Los Angeles (*1967) 67 Cal.2d 297, 305-306 [61 Cal.Rptr. 661, 431 P.2d 245]; *Fredrichsen v. City of Lakewood* (1971) 6 Cal.3d 353, 358 [99 Cal.Rptr. 13, 491 P.2d 805].) Because of VPD's correspondence and verbal assurances, OSC reasonably believed that it need not take any further action to perfect a claim against VPD. (*Bertorelli v. City of Tulare* (1986) 180 Cal.App.3d 432, 440 [225 Cal.Rptr. 582].) The claims statute may not be invoked to penalize a plaintiff who at the behest of a public entity has been induced not to take action, but instead to wait until the situation creating a conflict has stabilized. (*Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471, 492 [115 Cal.Rptr. 162].)

The estoppel doctrine aside, we also agree with the trial court's alternate finding that OSC substantially complied with the claims statute. The 1981 correspondence, together with the amended claim, enabled VPD to make an early investigation of the facts and determine whether the problem called for litigation or settlement. (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 277 [262 Cal.Rptr. 754]; *Myers v. County of Orange* (1970) 6 Cal.App.3d 626, 637 [86 Cal.Rptr. 198].) As stated, Barney's July 1981 letter acknowledged OSC's claim and memorialized an agreement

to negotiate or take final action on the claim at a later date. Such an agreement was authorized because VPD failed to give written notice of rejection of the claim within two years of accrual of the cause of action. (§913, 945.6, subd. (a)(2).) We conclude that OSC's letter of November 1982 informing VPD of its losses preserved the claim and was supplemented by the January 1984 "Amendment to Claim and Claim." (§910.6; Cal. Government Tort Liability Practice, *supra,* §6.53, p. 707.)

"The Tort Claims Act . . . expressly authorizes amendment of a claim before the prescribed period for claims presentation has expired, or before final action on the claim is taken by the public entity's governing board, *whichever is later.* (Gov. Code, §910.6.)" (Cal. Government Tort Liability Practice, *supra,* §6.68, p. 726, italics added.) If VPD believed the 1982 letter from OSC claiming $ 1.8 million in losses constituted a new claim but was untimely, it was required to take action on it. (§910.8; *Foster v. McFadden* (1973) 30 Cal.App.3d 943, 947-949 [106 Cal.Rptr. 685].)

Where, as here, a public entity fails to give notice of defects regarding the content or timeliness of the claim, it " . . . waives any defenses based on those insufficiencies." (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 702 [263 Cal.Rptr. 119, 780 P.2d 349], fn. omitted.) Although *Phillips v. Desert Hospital Dist., supra,* involved a personal injury claim that was subjected to a 100-day claims presentation requirement (at p. 705, fn. 3), the same principle applies here. VPD could not treat the 1982 letter as an untimely claim or repudiation of the 1981 agreement unless it provided written notice of rejection. (§913.) It failed to do so.

VPD nonetheless argues that the second cause of action for breach of an implied covenant of good faith was barred because it raised a new theory of recovery not reflected in the January 1984 amended claim. We disagree. The second cause of action incorporates the allegations of the first cause of action and alleges that VPD breached a covenant of good faith and fair dealing before and after the suit was filed. Having reviewed the supplemental complaint, the trial court concluded that "the second cause of action does not allege a separate and distinct contract . . .. [I]t is a statement, an alternate statement of an alleged breach of the contract which is alleged as set forth in cause of action number one..."

The trial court was right. The facts regarding the nature and cause of OSC's injury never changed. (White v. Superior Court (1990) 225 Cal.App.3d 1505, 1510-1511 [275 Cal.Rptr. 706].) The second amended complaint alleged that the implied covenants of quiet enjoyment and good faith were coexistent and simultaneously breached when VPD failed to remove the restrictive covenant. VPD continued to breach its contractual duties when it disavowed responsibility for the covenant- related losses, changed the lease terms, interfered with OSC's use and development of the property, and refused to remove the sand berm. A new statutory claim was not required for each damage flowing from the contractual breach.

VPD further complains that a fatal variance exists between the amount stated in the claims and the $31 million verdict. It asserts that the judgment should be reduced to $1 million, the amount stated in the January 1984 claim. This argument misconstrues the Tort Claims Act.

A statutory claim need only list "[t]he amount claimed . . . as of the date of presentation . . ., including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known . . .." (§910, subd. (f).) The claims statute does not require that a plaintiff be clairvoyant or accurately predict his future damages. It is well settled that a plaintiff who suffers continuing damages may be awarded damages accruing after submission of the claim. (*Amador Valley Investors v. City of Livermore* (1974) 43 Cal.App.3d 483, 489-490 [117 Cal.Rptr. 749].) OSC had the statutory right to file a supplemental complaint for damages arising after commencement of the action. (*Bendix Corp. v. City of Los Angeles* (1984) 150 Cal.App.3d 921, 926 [198 Cal.Rptr. 370].)

VPD also argues that OSC produced no evidence to support a jury finding that it complied with the claims statute. The argument misconstrues the record. VPD elected to bifurcate the trial and have the trial court rule on all factual and legal issues regarding the claims statute. (Code Civ. Proc., §597, 598; 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, §155-158, pp. 156-159.) Following the trial court's ruling, VPD offered no jury instructions on the issue.
" 'Under the doctrine of invited error, a party may not object to the sufficiency of the evidence to support a finding against him when the lack is the result of improper exclusion of evidence at his own instance.' [Citation.]" (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 290 [143 Cal.Rptr. 496].)

SECTION 945.6 STATUTE OF LIMITATIONS BAR

VPD next argues that the contract action was time-barred. (§945.6.) Where, as here, a public entity gives

written notice of rejection of the claim, section 945.6, subdivision (a)(1), requires that the action be filed no later than six months after service of the rejection notice. (*Dowell v. County of Contra Costa* (1985) 173 Cal.App.3d 896, 900 [219 Cal.Rptr. 341].) In those situations where a public entity fails to give written notice of the rejection, the action must be commenced within two years of the accrual of the cause of action. (§945.6, subd. (a)(2); *Lundeen Coatings Corp. v. Department of Water & Power* (1991) 232 Cal.App.3d 816, 827 [283 Cal.Rptr. 551].)

Here, the trial court determined that "the claims statutes have been complied with and/or waived." The first prong of section 945.6 was therefore satisfied because the complaint was filed within six months of the rejection of the January 1984 claim. (§945.6, subd. (a)(1).) OSC's second amended and supplemental complaint, which sought damages from 1984 to 1987, related back to the January 1984 claim and was unaffected by the statute of limitations. (*Bendix Corp. v. City of Los Angeles, supra*, 150 Cal.App.3d 921, 926.)

VPD nonetheless argues that portions of the judgment were barred by the second prong of section 945.6 because some of the damage claims arose more than two years before the complaint was filed. It contends, for example, that the $1.5 million award for breach of the option agreement was time- barred because the claim accrued more than three years before the complaint was filed. The argument fails for several reasons.

First, VPD waived sovereign immunity defenses when it appeared in bankruptcy court and filed a creditor's claim.

(11 U.S.C. §106(a); 6 Collier Bankruptcy Practice Guide (1992) §109.06, p. 109-6; *In re Cook United, Inc.* (Bankr.N.D.Ohio 1990) 117 Bankr. 301, 304-306; *In re Hughes-Bechtol, Inc.* (Bankr.S.D.Ohio 1991) 124 Bankr. 1007, 1017.)[3] "[T]he *quid pro quo* for filing a proof of claim is a partial waiver of . . . sovereign immunity. . . . [P] Once immunity has been waived, the state has subjected itself to any liability it has to the estate relating to the claim and transaction at issue." (*In re 995 Fifth Ave. Associates, L.P* (Bankr.S.D.N.Y. 1991) 127 Bankr. 533, 538.) Section 945.6, which is an operative part of the Tort Claims Act, was therefore waived by operation of federal law.

Second, VPD did not plead the statute as an affirmative defense to the contract claims. In its answer it alleged that the "second cause of action for tort damages is barred on account of plaintiffs' failure to timely present a claim to the District pursuant to Government Code §900 *et seq.*"

It is true that paragraph 46 of the answer also alleged that "[t]he claims and causes of action alleged asserted in the purported Complaint are barred by the applicable statutes of limitations, including but not limited to California Code of Civil Procedure Sections 337, 337.2, 338, 339, 340 and 342." (Code Civ. Proc., §458; *Davies v. Krasna* (1975) 14 Cal.3d 502, 508 [121 Cal.Rptr. 705, 535 P.2d 1161, 79 A.L.R.3d

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[3] Title *11 United States Code section 106*(a) states: "A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose."

807].) The statute of limitations defense is not constructively pled by general references to Code of Civil Procedure section 337 et seq. (Code Civ. Proc., §342; Cal. Government Tort Liability Practice, *supra,* §6.116, p. 825.)

Even if the statute of limitations had been properly pled, it was tolled until the Los Angeles action was settled. (§945.6, subd. (a)(2); Cal. Government Tort Liability Practice, *supra,* §6.53, p. 706.)[4] Moreover, the claims period was extended. Section 912.4, subdivision (b), provides that a public entity may extend the claims period by written agreement. Here, the agreement was memorialized in the July 1981 letter agreement. The trial court concluded that such an agreement was contained in the July 1981 letter. VPD led OSC to reasonably believe that the claims statute would toll if it continued with the project.

The trial court also concluded that the claims statute was waived until the Los Angeles action was settled. We agree. This had the effect of tolling the statute of limitations as well. (*Myers v. County of Orange, supra,* 6 Cal.App.3d 626, 634-637; *Denham v. County of Los Angeles* (1968) 259 Cal.App.2d 860, 866-867 [66 Cal.Rptr. 922].) The conduct of VPD and the July 1981 letter estopped it from evoking the statute of limitations defense as well as the claims statute. (*Ibid.*)

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[4] Section 945.6, subdivision (a)(2) states in pertinent part; "If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of such extension is not part of the time limited for the commencement of the action under this paragraph."

JURY FINDING THAT VPD BREACHED A COVENANT OF GOOD FAITH AND FAIR DEALING

VPD argues that as a matter of law the terms of the ground lease prevented any finding that it breached an implied duty of good faith and fair dealing. Interpretation of the ground lease presents a question of law for de novo review. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839].)

We are guided by the well-established rule that ". . . the law implies in *every* contract a covenant of good faith and fair dealing. [Citations.] Broadly stated, that covenant requires that neither party do anything which will deprive the other of the benefits of the agreement. [Citation.]"(*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 768 [206 Cal.Rptr. 354, 686 P.2d 1158].)

In California, the implied duty of good faith and fair dealing exists in virtually every commercial lease. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710].) "One of the covenant's components which has been established in the field of commercial leases is a duty on the part of a landlord to promote the continued use and occupancy of the premises by an existing tenant. [Citations.]" (*Mitchell v. Exhibition Foods, Inc.* (1986) 184 Cal.App.3d 1033, 1043 [229 Cal.Rptr. 535].)

We are also persuaded that the covenant existed here because of the particular arrangement between the parties. They had a joint venture agreement to share the rents and profits. (*Universal Sales Corp. v. Cal. Etc. Mfg. Co.* (1942)

20 Cal.2d 751, 771- 772 [128 P.2d 665]; *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 564-565 [140 Cal.Rptr. 330].)

VPD concedes that the ground lease contained an implied covenant of quiet enjoyment. It argues that a covenant of good faith and fair dealing may not be implied here; it must be express. Therefore, there was no breach. We disagree. Here, the implied covenant of good faith imposed a reciprocal duty upon the parties to do everything that the ground lease presupposed they would do to accomplish its purpose. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393 [272 Cal.Rptr. 387].)

We are of the view that the two covenants overlapped to impose similar duties of care. The covenant of quiet enjoyment ". . . insulates the tenant against any act or omission on the part of the landlord, or anyone claiming under him, which interferes with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy. [Citations.]" (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846 [122 Cal.Rptr. 114].)

VPD had a contractual duty to refrain from doing anything that would ". . . deprive the other of the benefits of the agreement." (*Ellis v. Chevron, U. S. A., Inc.* (1988) 201 Cal.App.3d 132, 139 [246 Cal.Rptr. 863]; *Lippman v. Sears, Roebuck & Co.* (1955) 44 Cal.2d 136, 143 [280 P.2d 775].) Any other construction would be tantamount to a "license to steal" and absolve VPD "from liability for conduct which would make the very contract itself and the security mentioned therein wholly valueless." (*Flying Tiger Line, Inc.*

v. U.S. Aircoach (1958) 51 Cal.2d 199, 203 [331 P.2d 37].)

Substantial evidence supports the jury's finding that VPD breached the covenant of good faith and fair dealing before and after the restrictive covenant was removed. The jury reasonably found that VPD had no express or implied contractual right to disavow responsibility for the covenant-related losses, change the terms of the lease, issue default notices in bad faith, or blight the project with a sand berm.*

CONCLUSION

*The judgment is affirmed. We order that the judgment be modified and reduced to $ 15,560,169. The parties shall pay their own costs on appeal.

Stone S. J., P. J., and Yegan, J., concurred.

Petitions for a rehearing were denied June 23, 1993, and the petition of appellant Ventura Port District for review by the Supreme Court was denied August 19, 1993.

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* See footnote, *ante*, page 1762.

* See footnote, *ante*, page 1762.

APPENDIX L

Appeal No. 97-55269

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

Ninth Cir. Ct. App. No. 97-55269
California Supreme Court No. S080112
U.S. Dist. Ct. No. CIV-94-03262-HLH

VENTURA GROUP VENTURES, INC.,
Plaintiff and Appellant,

v.

VENTURA PORT DISTRICT, et al.,

Defendants and Respondents.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
APPEAL NO. 97-55269

PETITION FOR REHEARING

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PETITION FOR REHEARING

TO THE CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Plaintiff and Appellant, Ventura Group Ventures , Inc. ("VGV"), petitions the Court for rehearing under *Federal Rules of Appellate Procedure*, Rule 40 in the captioned matter with reference to the Memorandum Decision enter on August 29, 2001.

STATEMENT OF COUNSEL & GROUNDS FOR REHEARING

In the judgment of counsel for VGV a rehearing is warranted for the following reasons: (1) The Court has overlooked and does not address the real issue VGV raised under the Guarantee Clause. (2) The Court incorrectly says VGV's challenge to Proposition 13 based on the Due Process Clause of the Fourteenth Amendment was not argued in its opening brief and fails to address the merits of that claim for that reason. (3) The Court has also apparently overlooked the issues raised in this case under the Taking Clause of the Fifth Amendment and VGV's objections to the California Supreme Court's treatment of this federal issue.

These points are all material to the decision in this case and are more fully discussed in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

1. VGV'S GUARANTEE CLAUSE CHALLENGE IS JUSTICIABLE AND PROPERLY BEFORE THIS COURT FOR DECISION.

The California Supreme Court rejected VGV's Guarantee Clause challenge to Proposition 13's "voter approval" provision as applied to taxes required to pay a money judgment against a local governmental agency on the merits. In its Memorandum Decision, this Court has acknowledged that it is not bound by the California Supreme Court's decision on this issue of federal law, but has declined, based on the recent decision in *Murtishaw v. Woodford*, 255 F. 3d 926 (9th Cir. 2001), to consider that issue because it presents "a nonjusticiable political question." *Murtishaw, supra*, 255 F.3d at 961.

VGV requests that the Court reconsider its reliance on *Murtishaw* for two reasons. First, neither *New York v. United States* ("*New York*") 505 U.S. 144, 184, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) nor *Pacific States Tel. & Tel. Co. v. Oregon*, ("*Pacific States*") 223 U.S. 118, 146, 32 S.Ct. 224, 56 L.Ed. 377 (1912), upon which the *Murtishaw* Court relied, supports such a broad proposition. Second, the Guarantee Clause issue raised in the case at bar is dramatically different from that presented in either *Murtishaw*, *New York* or *Pacific States*. The Guarantee Clause issue presented here is one of

first impression that deserves this Court's consideration.[1]

In *New York*, the State of New York claimed that federal waste disposal regulations, containing coercive conditions the state had to meet in order to secure federal funding or access to out of state disposal sites, violated the Guarantee Clause because they interfered with the free exercise of its representative state government. The Supreme Court declined to hold that all questions raised under the Guarantee Clause are "political questions" and considered the merits holding that:

> "these two incentives represent permissible, conditional exercises of Congress' authority under the Spending and Commerce Clauses, respectively, in forms that have now grown commonplace. Under each, Congress offers the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their legislative

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[1] The Court's Memorandum Decision states that VGV's Guarantee Clause challenge went to the fact that Proposition 13 prohibited taxes above the 1% countywide limit. That is not entirely accurate. As discussed in more detail below, VGV's challenge went to the fact that taxes above that limit could be authorized if two-thirds (2/3) of the voters consented which, in the case of an involuntary liabilities imposed by state or federal courts, gives the local voters the power to authorize taxes for what they want while refusing to authorize taxes required to pay involuntary liabilities imposed court judgments enforcing state and federal law, including judgments awarding "just compensation" to persons whose property had been taken for the public's benefit.

> agendas; state government officials remain accountable to the local electorate."

In *Murtishaw* and *Pacific States* the Guarantee Clause challenge was premised solely on the fact that the state law in question had been adopted by the People via a statewide initiative rather than by the elected statewide representatives. VGV's challenge was not that limited. VGV maintained that:

> "A system of state laws, whether adopted by statewide initiative *or vote of the state Legislature*, that provides that judgments issued by state courts enforcing state law need only be paid if two-thirds of the local taxpayers who must pay them agree to pay additional taxes, would replace the rule of law with an arbitrary system where the rights of the judgment creditor could be nullified at the whim of a mere one-third of the local property owners. Such a system would deprive all judgment creditors of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Such a system also violates the United States Constitution's guarantee of a republican form of government." (Emphasis added.) (Appellant's Brief, pages 36 to 37.)

In its Reply Brief, VGV urged that its claim was justiciable under the holding of *Pacific States*. As Justice White stressed there, the fact non-justiciable "political questions" regarding the existence of a republican form of state government are entrusted to Congress does not destroy

the "the judicial power and ever-present duty whenever it becomes necessary, in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power." *Pacific States*, *supra*, 223 U.S. at 150. (VGV Reply Brief, pages 19 to 20.)

An essential part of a republican form of government as envisioned by the Founding Fathers is an independent judiciary and it is an undeniable fact that the judicial power of the United States belongs to the courts under Article III and that the Constitution does not allow either the political branches or the People to exercise that power.[2] From these undeniable facts the sovereign power of the People to change their state constitution cannot extend to allowing the People themselves to decide whether or not judgments entered by the judicial branch will be honored. A state simply cannot substitute political answers by popular vote in place of judicial answers to justiciable questions (such as, determining whether judgments against local government will or will not be paid)

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[2] In *Franklin v. Gwinnett County Public Schools* 503 U.S. 60, 66, 112 S.Ct. 1028, 1033 503 U.S. 60, 112 S.Ct. 1028 (1992) the Supreme Court stressed that: "[f]rom the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court . . . In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), for example, Chief Justice Marshall observed that our Government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

any more than it allows the judiciary to give legal answers to political questions.

The Supreme Court made this clear in *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), where it was said:

> "in the absence of a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke *the existing jurisdiction of the courts for the protection of their justiciable constitutional rights*. 'The very essence of civil liberty,' wrote Mr. Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 163, 2 L.Ed. 60 (1803), 'certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.'" (Emphasis added.) *Davis v. Passman, supra* 442 U.S. at 242.

The Constitution simply does not commit all questions

regarding the existence of a republican form of state government to the "political departments" of the federal government. To the contrary, it imposes an affirmative duty on the "United States" and each and every branch of the United States government to guarantee that each of the separate states has a government "republican in form." This singularly important guarantee and unqualified duty to act precedes, and is not limited by, the separate and distinct obligation to protect the states from rebellion which the courts have held is exclusively committed to the "political departments" for the reasons clearly articulated by Justice White in *Pacific States*. But, it must be equally clear that if the People of a state, whether directly by initiative or indirectly through their elected representatives, pass laws making the payment of final judgments against local government discretionary at the option of the judgment debtor's voters, there is no political question to be answered. The only question to be answered in a case such as this is a judicial one. And, the answer is clear: in a republican form of government based on the rule of law, not men, the political power of a state whether exercised by its People or its political departments cannot make the enforcement of judgments a matter of politics.

Unlike the Fifth and Fourteenth Amendments, the focus of Article IV, section 4 of the United States Constitution is not on what a state cannot do (e.g., deny persons due process of law) or what a state must do (e.g., pay just compensation if private property is taken for public use) its focus is on what the United States must do and that is simply to assure that each state provide its citizens with a republican form of government.

The California Supreme Court has held Articles XIIIA, XIIIC and XIIID of the California Constitution require consent of the People before *any* taxes can be levied to pay *any* type of final judgment rendered by *any* court enforcing *any* law against a local governmental agency. The political branches of the federal government, even were they so inclined, have no means to enforce the Guarantee Clause in this setting. Since VGV has "no effective means other than the judiciary to enforce these rights" (*Davis v. Passman, supra*, 442 U.S. at 242), this Court has the duty to consider this issue.

2. VGV HAS NOT WAIVED ITS DUE PROCESS ARGUMENT AND THAT ISSUE IS ALSO RIPE FOR DECISION NOW.

The Court's Memorandum Decision also acknowledges that it is not bound by the California Supreme Court's comments regarding VGV's alternative challenge to Proposition 13 under the Due Process Clause of the Fourteenth Amendment, but it declines to consider the merits of this issue saying that VGV waived that argument by not raising it in its opening brief. (Memorandum Decision, page 3, fn. 1.) However, VGV's opening brief did argue, in addition to its Guarantee Clause challenge, that a system of state laws, whether adopted by statewide initiative or vote of the state Legislature "that would replace the rule of law with an arbitrary system where the rights of the judgment creditor could be nullified at the whim of a mere one-third of the local property owners" would also "deprive all judgment creditors of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution."

(Appellant's Brief, pages 36 to 37.)

This issue was also briefed before the California Supreme Court because it related to the state rule that a statute or state constitutional provision would, if possible, be narrowly construed to avoid creating an unconstitutional result under the United States Constitution. The California Supreme Court held that this cannon of interpretation was "beside the point here" because "as we have just concluded, the constitutional challenges raised by VGV are meritless." *Ventura Group Ventures, Inc. v. Ventura Port District, et al.*, 24 Cal.4th 1089, 1103 (2001). As VGV pointed out in its Supplemental Brief at page 15, the California Supreme Court did not discuss the "merits" of VGV's federal due process argument. All it said was that "[i]ronically, in the name of due process, VGV would deny districts the protections afforded them under Chapter 9 of the Bankruptcy Code." *Ventura Group, supra*, 24 Cal.4th 1089 at 1101.

The California Supreme Court begs the question. It does not address VGV's due process rights under the state's enforcement of judgment laws. It assumes, based on the District's right to protection under Chapter 9, that the state's enforcement of judgment law need not afford VGV the due process to which it is entitled under the Fourteenth Amendment. Since Chapter 9 did not, and obviously could not, repeal the Fourteenth Amendment and this Court is in apparent agreement with VGV that the California Supreme Court's determination on that issue of federal law is not binding on this Court, it needs to be considered.

As the United States Supreme Court has again stressed just recently, "[D]ue process, unlike some legal rules, is not

a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions . . ." *Lujan v. G&G Fire Sprinklers, Inc.* 532 U.S. 189, 121 S.Ct. 1446, 1451(2001). There, the United States Supreme Court held "that if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process." *Ibid.* By holding that Propositions 13 and 218 require, on a case by case basis, the agreement and consent of two-thirds (2/3) of the local taxpayers before a final judgment against a local governmental entity can be fully enforced, it is clear that "ordinary judicial process" no longer exists to enforce a judgment awarding "just compensation" against a local governmental agency in California. Although the California Supreme Court can choose to ignore the "involuntary indebtedness" rule that has been consistently applied by the courts of California for over 140 years, this Court cannot. As *Lujan* makes clear, what is and is not "ordinary judicial process" that comports with the Due Process Clause is a question to be determined by history, reason, and the past course of judicial decisions. These cases are relevant to that inquiry. VGV's Due Process argument was not waived and should be considered.

3. THE MERITS OF THE FEDERAL "TAKING CLAIM" ARGUMENT THAT HAS BEEN INJECTED INTO THIS CASE BY THE CALIFORNIA SUPREME COURT SHOULD ALSO BE ADDRESSED.

VGV's federal "taking" argument was briefed before this Court and the California Supreme Court because it also

related to the settled state rule that a statute or state constitutional provision would, if possible, be narrowly construed to avoid creating an unconstitutional result under the United States Constitution. As was the case with VGV's federal due process argument, the California Supreme Court found this cannon of interpretation beside the point holding that the federal "taking" argument had no merit. (*Ventura Group, supra,* 24 Cal.4th 1089 at 1103.) The sole reason again being the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment . . ." *Ventura Group, supra,* 24 Cal.4th 1089 at 1101.

VGV's Supplemental Brief, filed at the direction of the Court following the California Supreme Court's answers to the certified questions, pointed out that the bankruptcy court's order had not "discharged" the judgment. That order expressly left the questions regarding VGV's right to enforce payment under the state's enforcement of judgment law open to be decided in this Court. VGV also pointed out that even were this not true, the California Supreme Court's unsolicited view on federal bankruptcy law was seriously flawed. (VGV's Supplemental Brief, pages 15 to 19.) And, as was true with the California Supreme Court's purported decisions on the merits of VGV's Guarantee Clause and Due Process arguments, VGV maintained that this Court had an obligation to address the "taking" and bankruptcy issues as well. (VGV's Supplemental Brief, pages 5 to 12.)

While, the Court has considered VGV's other federal claims in its Memorandum Decision, the federal "taking" and bankruptcy issues have not been addressed. Since it is clear, at least to VGV, that much if not all, of the avoiding,

misstatements of fact and law and the uncalled for misapplication of the Bankruptcy Code about which VGV complained in its Supplemental Brief were injected into this case by the California Supreme Court in a calculated effort to defuse a potential federal "taking" claim against the State before it accrued, this Court should address the "taking" issues in the context of the present declaratory relief action.

The United States Supreme Court has made it clear that there is no federal constitutional injury and no justiciable federal "taking" claim under the Fifth and Fourteenth Amendments until the plaintiff has availed himself of the state's procedures for obtaining compensation for the injury, and has been denied just compensation. See, e.g., *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jackson City*, 473 U.S. 172, 190, 194 (1985). See, also, *Robinson v. Ariyoshi*, 887 F.2d 215, 216 (9th Cir.1989).

VGV has, for several years now, proceeded with its present declaratory relief action seeking a judicial remedy under the State's enforcement of judgment law to secure payment of the "just compensation" it was awarded in 1991. As already mentioned, the Bankruptcy Court did not deny VGV that remedy. Nor did this Court deny VGV that remedy. This Court properly left it to the California Supreme Court to decide that state law issue.

The California Supreme Court, by disapproving *F&L Farm Co. v. City Council*, 65 Cal.App.4th 1345, 77 Cal.Rptr.2d 360 (1998) and endorsing both Propositions 13 and 218, has held, in no uncertain terms, that not just VGV but all judgment creditors of local government have no effective means under state law to satisfy a court judgment

imposing an unexpected and involuntary debt on local government. More importantly, its conclusion that this is constitutionally permissible is based entirely on its unsupported view of the Bankruptcy Code and, more particularly, Chapter 9. Although the People of California most likely did not intend, by adopting Propositions 13 and 218, to subject the State treasury to the ultimate payment of judgments awarding just compensation against local entities, the California Supreme Court should have considered that before it rejected the more narrow and clearly constitutional construction VGV advocated for Propositions 13 and 218. This federal question aspect of this declaratory relief case is properly before this Court and should be addressed now.

At this point, VGV has already exhausted its available state remedy against the District under the state's enforcement of judgment law to collect the balance of the "just compensation" it was awarded. (Unless, of course, this Court on rehearing were to accept either VGV's Due Process or Guarantee Clause challenges to Propositions 13 and 218, reverse the judgment of the District Court and declare that the Port District must levy taxes or assessments to pay the judgment.)

There is no reason to add another layer of litigation in this case.[3] It is clear where the California Supreme Court

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[3] If the judgment in favor of the District is affirmed and VGV is forced to file a "taking" suit against the State, the federal district court will have subject matter jurisdiction. The State, however, would have an immunity defense under the Eleventh Amendment which, if sustained, would require VGV to proceed in state, not federal court. The California Supreme Court is the

stands. This Court is not bound by the California Supreme Court's decisions on federal law in this case and should address the substance of the California Supreme Court's unsolicited views on the "merits" of VGV's "taking" claim and its remarkable assertion that federal bankruptcy law supercedes the requirement of "just compensation" imposed on the states by the Fifth and Fourteenth Amendments. "The Constitution requires just (i.e., full) compensation." *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 748; 117 S.Ct. 1659, 1671 (1997) (Scalia, J. concurring).

CONCLUSION

The Court's Memorandum Decision should be withdrawn or vacated and upon rehearing the Court should consider the merits of VGV's Guarantee Clause and Due Process Clause challenges to Propositions 13 and 218 and if the merits of those arguments do not result in a reversal of the District Court's judgment, the Court should address the merits of the California Supreme Court's view that VGV does not have a meritorious federal taking claim.

That VGV must request that the Court address the

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instrumentality of the State that has rendered VGV's judgment against the District worthless. In response to this Court's request for clarification of state law, the California Supreme Court has taken upon itself to address the "merits" of VGV's federal "taking" claim such that there is little doubt as to the reception VGV's "fair opportunity claims" will receive there. One might even suggest that the prospect of forcing a citizen to litigate in such a hostile forum is precisely why the Eleventh Amendment, as written, does *not* apply to suits by citizens against their own state government.

taking issue in this case is precisely why its Guarantee Clause challenge should be sustained. The People of the State of California have, in the area of enforcing judgments against local governmental entities, effectively eliminated an independent state judiciary in California.

DATE: September 10, 2001.

Respectfully submitted,

HEILY & BLASE
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By_____
John R. Johnson
Attorneys for Appellant
Ventura Group Ventures, Inc.

APPENDIX M

No. S080112

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

VENTURA GROUP VENTURES, INC.,
Plaintiff and Appellant,

v.

VENTURA PORT DISTRICT, et al.,
Defendants and Respondents.

No. S080112
Ninth Cir. Ct. App. No. 97-55269
U.S. Dist. Ct. No. CIV-94-03262-HLH

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT IN
APPEAL NO. 97-55269

PETITION FOR REHEARING

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S080112

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

VENTURA GROUP VENTURES, INC.,

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v.

VENTURA PORT DISTRICT, et al.,

Respondents and Defendants.

No. S080112
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U.S. Dist. Ct. No. CIV-94-03262-HLH

PETITION FOR REHEARING

Plaintiff and Appellant Ventura Group Ventures, Inc. ("VGV") petitions this Court for a rehearing of its Opinion filed on February 15, 2001.

1. GROUNDS FOR REHEARING.

As the Court correctly observes, it should come as no

surprise to VGV or anyone else that the days when a district could expect a county "to levy taxes to raise whatever sum the district budget calls for . . . are long gone." (Opinion, page 9.) VGV does not dispute that the people adopted Proposition 13 to "put local government on a strict budget and require it to make painful choices." (Opinion, page 16.) What VGV questioned, in the case at bar, was *not* whether the voters had declared the practice of budgeting first and taxing later to "no longer be acceptable." *What VGV questioned was whether the voters intended Proposition 13 to make the practice of paying just compensation for property taken for public use "no longer acceptable" in California, and if so, whether they could constitutionally accomplish that result.*

By adopting Proposition 13, the state electors authorized, if not forced, local government to utilize non-property tax methods (like Ocean Service Corporation's ("OSC") long term lease) to finance needed capital improvements in the future. The Board of Port Commissioners' discretion and authority to contract for the construction of the Harbor Village, as long as the necessary funds were raised by some means other than taxes, is not disputed. It is also beyond dispute that had District officials not evicted OSC in bad faith in 1987, shortly after the project was completed, OSC would still be enjoying the fruits of the 50-year lease today. Instead, as a sole result of the District's "deliberate" breach of the implied covenant, the District has OSC's leasehold and OSC has an unsatisfied judgment. A judgment which this Court says need not be paid in full, although the District has acquired a multimillion dollar capital improvement at OSC's expense.

This Court's construction of Proposition 13 does not require local government to make "tough choices" or "painful decisions." To the contrary, it places the financial "pain" for government's willful choices and deliberate actions on those few private parties who trusted government to act in good faith in its business dealings. If local government can shift to private parties the pain resulting from their authorized agents' deliberate acts, local government can continue its spendthrift ways by simply refusing to pay judgments rendered against it. The unvarnished truth is: This Court has rendered judgments which award "just compensation" for private property taken for public use "no longer enforceable" in California without even discussing the decisive questions of whether this is what the voters intended or if this is what the federal constitution allows. By its holding that local officials have absolute "discretion" to breach the implied covenant, this Court has made taking private property without compensation all too easy.

To reach the conclusions it has, the Court misstates the facts, mischaracterizes VGV's contentions, ignores its own settled principles of law, sidesteps the most important issues VGV has raised and inexplicably fails to give either a direct or meaningful answer to the state law issues the Ninth Circuit posed. For these reasons, which are more fully discussed below, VGV's Petition for Rehearing should be granted.

2. THE DISTRICT'S DEBT TO OSC WAS NOT DISCHARGED BY THE BANKRUPTCY COURT.

A disturbing and recurring theme throughout the Court's opinion is that OSC received the "just compensation"

to which it was entitled under the Fifth Amendment when the Bankruptcy Court discharged the District's debt. The Court summarily rejects VGV's "taking" argument under the United States Constitution, asserting "[t]he discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment to the United State's Constitution. (Opinion, page 14.) The Court also accuses VGV of seeking to "deny districts the protections afforded them under chapter 9 of the Bankruptcy Code." (Opinion, page 13.)

But the truth of the matter is that the Bankruptcy Court's order provided that the District's debt to OSC was ***not*** discharged to the extent taxes could be levied to pay it. The Bankruptcy Court's order establishes beyond doubt that if taxes can be levied to pay the judgment, until those taxes are levied, and OSC is paid, OSC has ***not*** received the "just compensation" to which it is entitled. By assuming otherwise, this Court has turned the Bankruptcy Code on its head and has given local government far greater protection from judgment creditors than either the Bankruptcy Code or the United States Constitution allows.

When this Court says that "***under the facts of this case***" Article XIII A of the California Constitution prohibits a levy under *Harbors and Navigation Code* § 6361 to pay a money judgment as required by *Government Code*, §§ 970 to 971 and suggests that the City of Lindsay should seek protection under Chapter 9 rather than pay the F&L Farms' judgment (Opinion, page 16), the Court is not addressing the issues of state law certified to it by the Ninth Circuit. It is offering its interpretation of the Bankruptcy Code. Even were this Court justified in saying (which it is not) that a payment

of $8 million dollars in 1998 is "just compensation" for the taking of a $15.6 million dollar asset in 1987, it was not the Bankruptcy Court's job to determine what is and what is not "just compensation" under the Fifth Amendment. Needless to say, the Ninth Circuit did not, and properly could not, certify any question to this Court regarding the scope of protection afforded by Chapter 9 or the Bankruptcy Court's order in this specific case for one very clear reason.

Congress adopted Chapter 9 to provide relief when severe national economic contractions caused what has been called a "death spiral" for local governmental entities. When economic conditions were such that a great number of local taxpayers were unable to pay the taxes levied on their properties, local government's tax base shrunk dramatically and the decrease in tax revenue accelerated as it became the owner of more and more tax defaulted properties to the point where something had to be done. But, the states themselves lacked the power and ability to provide any relief to their local governmental entities caught up in a tax default death spiral such as this for one straightforward reason, which was " the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation." *Peoples State Bank v. Imperial Irr. Dist. et al.* (1940) 15 Cal.2d 397, 401.

Naturally, if state and local government could lawfully allow local taxpayers to decide, during tough economic times, which contractual debts and obligations, incurred on their behalf, could be paid by taxes, *there would be no need for Chapter 9*. This is why the questions posed by the Ninth Circuit had to be answered before, not after, consulting the Bankruptcy Code. By basing its decision on the Bankruptcy Code, this Court puts the cart (Chapter 9) before the horse

(the United States Constitution) and by doing so fails to provide a straight answer to the questions of state law that were certified to it by the Ninth Circuit.

3. THE PUBLIC RECEIVES ALL REVENUE FROM THE "CONTINUED OPERATION" OF THE HARBOR VILLAGE COMPLEX.

The second serious misconception is the Court's statement that "because of the failure of the commercial marina project, there is no means of fixing an assessment valuation per acre for each parcel in proportion to the benefits to be derived from the "continuance in operation" of the project as required by Water Code section 51323." (Opinion, at page 20.) This is simply not so. Since the Port District "evicted Ocean from the property and took control of the marina facilities" in 1987, it has received and will continue to receive, *for the public's use*, all revenues generated by OSC's Harbor Village project. That project continues to contribute approximately $2.5 million dollars each year to fund public services the District's constituents desire.

4. THE COURT'S CONCLUSION THAT THE PORT DISTRICT HAD "DISCRETION" TO "VIOLATE THE IMPLIED COVENANT" LEAVES MANY QUESTIONS UNANSWERED.

The Court finds, without discussion of the facts or citation of a single case authority, that the District had

absolute discretion "to violate" the implied covenant of good faith and fair dealing. (Opinion, pages 11-12.) Based on that finding, the Court then concludes that the judgment arose from a "discretionary act" for which additional taxes were not allowed under the Legislature's pre-Proposition 13 statutes. The Court then says it is not required to answer "the question whether an exception for judgment resulting from nondiscretionary acts should be read into Article XIII A." (Opinion, page 12.) There are several problems with this analysis.

First, and most troubling, is that it has already been conclusively determined that the Port District had no discretion "to disavow responsibility for the covenant-related losses, change the terms of the lease, issue default notices in bad faith, [and] blight the project with a sand berm," (*Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, 1781; 19 Cal.Rptr.2d 750). The District's claim that it had discretion to act in the fashion it did, *vis a vis* OSC, was rejected by a unanimous jury and a superior court judge 11 years ago. Thereafter, three justices of the Court of Appeal and all seven justices of this Court affirmed that finding. To reverse that finding 11 years later is unprecedented. The Seventh Amendment to the United States Constitution was adopted to prohibit reexamination of facts that had been settled by a previous jury. *United States v. Wonson,* (1812) 28 F.Cas. 745, 750 (No. 16,750) .

Second, if Proposition 13 repealed the Legislature's 1973 enforcement of judgment statutes (as the Court seems to imply in its discussion of the *F&L Farms* decision) what judgments were or were not covered by those statutes is irrelevant and the Court should give a direct answer to the

Ninth Circuit's query as to whether the "involuntary indebtedness" rule, developed by this Court in construing the Debt Limit provision of the California Constitution Article XVI, "should be applied in the Article XIII A context." *Ventura Group Ventures v. Ventura Port District* (1999) 179 F.3d 840, 844.

Third, if this Court is now holding that the Legislature intended to give local officials "discretion" to deprive OSC of its property in bad faith, this Court must consider, ***and it has not***, whether the United States Constitution allowed the District to exercise that discretion without paying just compensation for what the public took from OSC. *Armstrong v. United States*, 364 U.S. 40 (1960) (*"Armstrong"*) established a principle of paramount importance. If private property is taken by government in the enforcement of a discretionary power, just compensation must be paid if otherwise the property owner would be forced "*alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong, supra*, 364 U.S. at p. 48. The hallmark Fifth Amendment "taking" case of *Chicago B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1896) (*"Chicago"*) made the Fifth Amendment's "just compensation" requirement applicable to the States via the Fourteenth Amendment's Due Process Clause because:

> "[d]ue process of law, as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against

> the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." *Chicago, supra,* 166 U.S. at 236.

Finally, by implying that the Legislature's pre-Proposition 13 statutes treated contract judgment creditors in a more draconian fashion than did Proposition 13, the Court avoids answering the serious questions VGV presented under the Constitution's Guaranty Clause and the Fourteenth Amendment's Due Process Clause, i.e., in a republican government can local voters be allowed to determine whether a final judgment entered against their local government under state law should be paid or not?

These questions deserve an answer, particularly if the District did have "discretion" to breach the implied covenant of good faith and thereby take its joint venturer's interest in the Harbor Village project for public use. These are not "makeweight" issues.

5. THE COURT IGNORES 140 YEARS OF SETTLED LAW AND THE UNITED STATES CONSTITUTION TO HOLD THAT THE DISTRICT HAD DISCRETION TO TAKE OSC'S PROPERTY.

As VGV pointed out in its Petitioner's Brief on the Merits at pages 18-24, an unbroken line of decisions by this Court under the State Constitution's Debt Limit provision had

required the payment of debts and liability imposed by law regardless of statutory or constitutional limits on the local entity's discretion to incur debt. (Petitioner's Brief on the Merits, pages 18-24.)

The fact is, it was in 1860, (well before the *Chicago* Court held the Fifth Amendment's Taking Clause applied to the states under the Fourteenth Amendment) that this Court, in *McCracken v. City of San Francisco* (1860) 16 Cal. 591, rejected the notion that the District had discretion to take OSC's lease in bad faith. There, this Court refused to allow the City of San Francisco to avoid payment of a similar judgment based on the pretense of excessive indebtedness. As the Court said then, were it to condone non-payment of such a judgment the City:

> " . . . would be the most irresponsible corporation on earth, and her treasury would be, in many instances, but a receptacle for others' property without possibility of restitution. The truth is, there is no such exemption from liability on her part. The same obligations to do justice rest upon her as rest upon individuals. *She cannot appropriate to her own use the property of others, and screen herself from responsibility upon any pretense of excessive indebtedness* . . . The restriction can, in any event, only apply to liabilities dependent for their creation upon the volition of the Common Council . . ." (Emphasis added.) *McCracken*, *supra*, 16 Cal. at 631-632.

Not only is this line of cases disregarded, this Court, by misstating VGV's position, refuses to acknowledge, much less apply, this Court's equally well settled rule that:

> "'The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business, and the conduct of business enterprises and contracts with individuals, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law . . .'" *Chapman v. State of California* (1894) 104 Cal. 690, 38 P. 457. (Petitioner's Brief on the Merits, page 30.)

As VGV pointed out in its Brief on the Merits at pages 30 to 32, this Court has repeatedly and uniformly held that neither state nor local government has discretion, to breach a contract. See, e.g. *Souza and McCue Constr. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510-511; 20 Cal.Rptr. 634, 370 P.2d 338, *E. H. Morrill Co. v. State of California* (1967) 65 Cal.2d 787, 793; 56 Cal.Rptr. 479; 423 P.2d 551. VGV also noted, this "same fundamental rule applies to the federal government as well. *United States v. Bostwick* (1877) 94 U.S. 53, 66, 24 L.Ed 65 ('The United States, when they

contract with their citizens, are controlled by the same laws that govern citizens in that behalf.') and *Cooke v. United States* (1875) 91 U.S. 389, 398; 123 L.Ed 237 (when the United States 'enters the domain of commerce, it submits itself to the same laws that govern citizens there.')" (VGV Brief on the Merits, page 31).

The United States Supreme Court has made clear that not even Congress, which has the constitutional right to impair contracts, can exercise that right without payment of just compensation if to do so would force "some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole." *United States v. Winstar Corp.* (1996) 518 U.S. 839, 883; 135 L.Ed 2d 964, 116 S.Ct. 2432. citing *Dolan v. City of Tigard*, 512 U.S. 374, 384, 129 L.Ed 2d 304, 114 S.Ct. 2309 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed 2d 1554, 80 S.Ct. 1563 (1960)).

Without discussion of the constitutional concerns and the unbroken line of state and federal decisions holding that there is no sovereign power to breach contracts with impunity[1], this Court announces that in the State of California

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[1] By incorrectly saying that VGV's "taking" argument rests "entirely upon" the Court of Appeal's recent decision in *F&L Farms v. City Council of the City of Lindsay* (1998) 65 Cal.App.4th 1345, 77 Cal.Rptr.2d 360 (Opinion, page 13), the Court appears to believe it need not address any of the contract issues VGV presented relative to the "taking" clause. The Court's focus on *F&L Farms* is unfortunate because that case involved a state inverse condemnation "damage" claim and not a federal "taking"claim under the Fifth Amendment. When Defendants attempted to recharacterize VGV's contentions to match those of the *F&L Farms*

the Legislature can by statute, or the People can by initiative, authorize local government to pay less than the amount a jury awarded, and the courts affirmed, if the judgment happens to be "founded" on contract. This Court cannot allow either Proposition 13 or the Legislature's enforcement of judgment statutes to shift the burden of the judgment from the District to OSC. To do so sanctions an uncompensated taking of private property for public use which is clearly prohibited by the Fifth and Fourteenth Amendments to the United States Constitution. To do so also condones making the District "but a receptacle for other's property without the possibility of restitution" which this Court said cannot be allowed in *McCracken, supra*, 16 Cal. at 631-632.

6. BY MISSTATING VGV'S ARGUMENT REGARDING THE LEGISLATURE'S ENFORCEMENT OF JUDGMENT STATUTES, THE COURT FAILS TO ADDRESS ANOTHER IMPORTANT POINT.

The Court fails to discuss VGV's argument that Proposition 13 did not repeal *Harbors and Navigation Code* §§6361 and 6362 because these two statutes were incorporated by the Legislature into *Revenue and Taxation Code* §§ 2263 and 2271 in 1973 and those statues were then expressly incorporated by reference into the enforcement of judgment law, i.e., *Government Code* § 971 in 1980. (VGV's

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case VGV pointed out that "[t]he facts of the case at bar and the taking that occurred here are far more egregious than those that the *F&L Farms* court considered." (VGV Reply Brief, page 8).

Brief on the Merits, pages 16 to 20). This issue must be considered because if the Court is correct in saying the judgment was "discretionary," the enforcement statute, *Government Code* § 971, would still allow taxes to be levied at the rate of ten cents per $100 of assessed value (the rate set by *Harbors and Navigation Code* § 6362) to pay "discretionary" judgments.

VGV' claim that *Harbors and Navigation Code* §§6361 and 6362 and *Revenue and Taxation Code* §2271 were incorporated by reference in the enforcement of judgment law was not a "fallback position" as the Court inaccurately implies. (Opinion, page 10.) This was VGV's principal argument. After reviewing the history of §§6361 and 6362 and observing that the District's voters had approved taxes up to the limit set by §6362 when the District was formed in 1952, VGV pointed out there was:

> "[A] a more fundamental reason why *Harbors and Navigation Code* §§6361 and 6362 were not repealed when Proposition 13 was adopted. *Revenue and Taxation Code* §2263 says that "the maximum property tax rate which may be levied by, or on behalf of, a special district formed prior to January 1, 1972, shall be: (1) the maximum property tax rate authorized by the enabling statute under which the district is organized . . ." *Harbors and Navigation Code* § 6362 is the enabling statute that establishes the so-called maximum tax rate for the District at ten cents (.10) per $100 of assessed value. As such, *Harbors and Navigation Code* §§6361 and

> 6362 are also an integral part of the Legislature's statutory provisions governing the manner in which a local public entity must pay judgments against it. (VGV's Brief on the Merits, page 16.)

If the enforcement of judgment law was not impliedly repealed by Proposition 13 (a question which this Court has left in doubt), would not VGV be entitled to have taxes levied at the ten cents per $100 rate set by *Harbors and Navigation Code* §6362 for a judgment arising from a "discretionary act", if this Court is correct in saying, at this late date, that the District officials had discretion to do what they did?

7. THE COURT ALSO FAILS TO DISCUSS SECTION 3 OF ARTICLE XIII A, ALTHOUGH THAT SECTION, NOT SECTION 1, APPLIES TO STATE TAXES.

The Court begins its discussion of the issues by discussing the "Exception for Prior Indebtedness" under Article XIII A, Section 1 (Opinion, page 7), although the Court says VGV "abandoned" that claim. (Opinion, page 8.) But then the Court does not address the real issue VGV raised under Article XIII A, Section 3. As VGV pointed out in its Reply Brief:

> "Defendants do not dispute the fact that 'no California court has ever held that Proposition 13 impliedly repealed state statutes of this nature.' (Petitioner's Brief, page 15.) Nor do defendants take exception with plaintiff's

observation that the tax imposed by Harbors and Navigation Code § 6361 would be exempt from Article XIII A, Section 1 as a 'prior indebtedness' under the reasoning of Goodman v. County of Riverside (1983) 140 Cal.App.3d 900, 190 Cal.Rptr. 7 and Kern County Water Agency v. Board of Supervisors (1979) 96 Cal.App.3d 874, 158 Cal.Rptr. 430 (see Petitioner's Brief, pages 15-16). Nor do the defendants comment on VGV's suggestion that Goodman was more properly decided on the basis that existing state-imposed taxes were not affected by Proposition 13 by virtue of Article XIII A, Section 3. (Petitioner's Brief on the Merits, page 16.)

"The reason defendants give for not addressing these issues is that VGV concedes that a *judgment* by definition cannot qualify as a *voter-approved indebtedness* under the exception contained in Article XIII A, Section 1, subdivision (b). (See Respondents' Joint Brief, fn. 6, at page 20.) However, the fact that a judgment cannot be considered a *voter-approved* indebtedness under Article XIII A, Section 1 has nothing to do with VGV's suggestion that the state statutes governing the payment of a judgment and the taxes to be levied for this specific purpose are state-imposed taxes governed by Article XIII A, Section 3. (See Section 2, supra.)." (VGV's Reply Brief, page 9.)

When the amici also failed to address Article XIII A, Section 3, VGV pointed out:

> "[t]he fact that the Cities and the Association have deliberately distorted VGV's position rather than address this issue on its merits is established by the fact that neither Government Code §§970-971 nor Article XIII A, Section 3 are mentioned a *single* time by either the Association or the Cities. Instead, the Cities and the Association pretend that VGV claims that taxes to pay the judgment are a prior indebtedness under Article XIII A, Section 1." (Petitioner's Answer to Amici Briefs, page 9.)

Apparently, the Court has accepted the Defendants' misstatement of VGV's position. Regrettably, this Court has also failed to mention Article XIII A, Section 3 a *single* time in its Opinion.

8. THE COURT, NOT THE PEOPLE, HAS REWRITTEN THE STATE CONSTITUTION.

It has long been settled that the People, by an initiative amendment to the state Constitution, cannot impliedly repeal a taxing statute adopted by the Legislature. "The Legislature's authority to impose taxes and regulate the collection thereof exists unless it has been *expressly* eliminated by the Constitution. [Citation.] (*Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 624 [194 Cal.Rptr. 294].)" (Emphasis added.) (*County of Los Angeles v. Sasaki* (1994) 23 Cal.App.4th 1442, 1453-

1454). VGV argued that there was simply nothing in Proposition 13 to indicate, much less make it absolutely clear, that a repeal of the Legislature's comprehensive enforcement of judgment law was intended. (VGV's Brief on the Merits, pages 26 to 27.)

As Justice Sparks explained in *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, the rule against implied repeal:

> ". . . arises from the very nature of California's tripartite form of government. Thus, subject to the reserved powers of initiative and referendum, '[t]he legislative power of this State is vested in the California Legislature . . .' (§Cal. Const., Art IV, 1.) The people, in their Constitution, may place restrictions upon the exercise of the legislative power by the Legislature but the courts may not do so without violating the fundamental separation of powers doctrine. Judicial application of clear and unequivocal constitutional restrictions on the Legislature's authority merely enforces the people's exercise of the right to place restrictions upon the Legislature. On the other hand, legislative restraint imposed through judicial interpretation of less than unequivocal language would inevitably lead to inappropriate judicial interference with the prerogatives of a coordinate branch of government. Accordingly, the only judicial standard commensurate with the separation of

> powers doctrine is one of strict construction to ensure that restrictions on the Legislature are in fact imposed by the people rather than by the courts in the guise of interpretation." (Emphasis added.) (*Schabarum, supra.*, 60 Cal.App.4th at 1217.)

The fact the voters intended Proposition 13 to declare that "the practice of 'budgeting first, taxing later' was no longer acceptable," (Opinion, at page 9), is not a "clear and unequivocal" declaration that the voters' intent was "to restrict the Legislature's exercise of the legislative prerogative" to mandate how judgments against local government were to be paid. That statement is also insufficient to support a finding that the voters had, by Proposition 13, intended to declare the practice of paying just compensation for property taken for public use "was no longer acceptable" in California.

The Court must grant rehearing to consider this point. By the decision in this case, the Court has allowed Defendants, by litigation, to expand the scope of Proposition 13 to prohibit the levy of taxes the Legislature mandated be levied to pay obligations imposed by statewide law. Not only is such an intent not expressed anywhere in Proposition 13, *that initiative clearly and unequivocally expressed a contrary intent in Article XIII A, Section 3*. (VGV's Brief on the Merits, pages 28 to 29.)

9. THE COURT ENTIRELY MISSTATES VGV'S POSITION REGARDING SPECIAL ASSESSMENTS UNDER *HARBORS AND NAVIGATION CODE* § 6365.

VGV does not and did not contend that "every project undertaken by a port district is equally beneficial to all of the properties within the district." (Opinion, page 20.) What VGV said was that:

> "The local voters themselves declared in 1952, when the District was formed, that *all* real property within the District's taxing boundaries would be benefitted by the 'creation *and* operation' of the Ventura Harbor. In light of this undisputable fact, the Legislature was completely justified in concluding that *all* lands within a port district would be benefitted by the *continued operation* of a public improvement of this nature." (Emphasis in original.) (VGV's Brief on the Merits, page 40.)

The Court's retort, "[i]f everything is special, then nothing is special" (Opinion, page 20), is neither logical nor accurate. Surely, the Court does not mean to say that VGV's argument fails because if everything is benefitted, then nothing is benefitted. What the Court seems to be attempting to say is that VGV's argument under the statute fails because if the special benefit to each property within the district is the same no one property would receive a greater benefit than another. But even were this true (and there has been no evidence presented to say that it is or is not true), the

Legislature can most certainly allow assessments when all properties within the District are presumed to receive some special benefit. The Legislature was well aware, and expressly acknowledged, that the benefits might not be equal. That is why it gave the Board of Port Commissioners discretion under *Harbors and Navigation Code* §6365 subdivision (h), to *apportion* the required assessment on any "reasonable basis" amongst the landowners in the District. (VGV's Reply Brief, page 13.) The Court's treatment of this aspect of the case is not supported by either the record or the language of *Harbors and Navigation Code* §6365.

As already mentioned, the Court's other reason for rejecting VGV's right to assessments under §6365, subdivision (d), i.e., that the District no longer receives a benefit from that project, is just plain wrong. Since the District took over OSC's leasehold interest in 1987, the District continues to receive approximately $2.5 million dollars of revenue each year from the continued operation of OSC's project. Money which, had OSC not been evicted in bad faith, would be going to compensate OSC for its investment.

The Court should also reexamine its reliance on Articles XIII C and XIII D. Before the Ninth Circuit it was VGV's position that:

> "Proposition 218 passed at the 1997 general election and Articles XIII C and D of the California Constitution went into effect on July 1, 1997. Neither article was considered by the District Court for this reason. The first hurdle defendants encounter is the simple fact

> that if this Court needs to consider Proposition 218, it has already decided that Proposition 13 did not impliedly repeal *Revenue and Taxation Code* §§2205, 2263, and 2271, or *Harbors and Navigation Code* §6362, and that the state Legislature's 1980 amendment to *Government Code* §971 as well as its 1991 enactment of *Harbors and Navigation* Code §6365, were proper. If the Court arrives at this point, it has concluded that taxes and assessments could properly be levied to pay the 1991 judgment. To suggest that the 1997 initiative could retroactively void these statutes would unquestionably result in an unauthorized impairment of contract rights and a taking of plaintiff's property without just compensation. *United States Trust Company, supra*, 431 U.S. 1, 19, fn. 16. The drafters of Proposition 218 as much as concede this to be the case. See article XIII D, section 5, subdivision (d)." (VGV's Ninth Circuit Reply Brief, page 25 to 26.)

The Ninth Circuit did not inquire (as it did with Proposition 13) whether either of the articles adopted by Proposition 218 prohibited the District from levying the taxes mandated by *Harbors and Navigation Code* § 6361. Nor did it make such an inquiry as to the assessments allowed by *Harbors and Navigation Code* § 6365, subdivision (d) to satisfy "liabilities arising from projects." The reason for this appears to be obvious, and if it is not, the Court should consider the constitutional objections to the retroactive application of Proposition 218.

CONCLUSION

For the reasons stated above the Court's February 15, 2001 Opinion should be vacated and a rehearing should be granted in this case.

DATED: February 28, 2001.

Respectfully submitted,
HEILY & BLASE
JOHN R. JOHNSON

By_____
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APPENDIX N

Appeal No. 97-55269

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

VENTURA GROUP VENTURES, INC.,)
Plaintiff and Appellant,)
)
v.)
)
)
VENTURA PORT DISTRICT, et al.,)
Defendants and Respondents.)
)

Ninth Cir. Ct. App. No. 97-55269
California Supreme Court No. S080112
U.S. Dist. Ct. No. CIV-94-03262-HLH

APPEAL FROM THE U.S. DISTRICT COURT FOR
THE
CENTRAL DISTRICT OF CALIFORNIA
APPEAL NO. 97-55269

APPELLANT'S SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

1. INTRODUCTION.

The California Supreme Court was asked two questions. Had those questions been answered in Defendants' favor, the federal questions Ventura Group Ventures ("VGV") raised would be ripe for decision. On the other hand, had the California Supreme Court resolved the questions of state law in VGV's favor there would be no need for this Court to consider the federal issues VGV presented. Unfortunately, however, the California Supreme Court avoids answering the first state law question, provides an inadequate answer to the second and ultimately bases its decision on federal, not state law.

An examination of its opinion as it relates to the first question reveals that under the guise of judicial restraint, the California Supreme Court advances a revolutionary and controversial concept of federal law: which is that Chapter 9 precludes both itself *and* this Court from considering the merits of the state and federal issues VGV raised as to the proper application of Article XIIIA[1] in this case. In the process of reaching this conclusion, it holds that in California, local government has "discretion" to breach contracts with impunity, which raises yet another federal issue for this Court to consider.

After avoiding a direct answer to the first question the

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[1] References to Articles are to the California Constitution unless otherwise indicated.

California Supreme Court, in the process of answering the second question, endorses Articles XIIIC and XIIID adopted by statewide initiative in 1997. By doing so, it is made clear that were it forced to answer this Court's first question its answer would be: yes, state law prohibits local government from levying any tax *or* assessment to pay any type of judgment imposed by state wide law *unless* two thirds (2/3) of the local electorate vote to approve that levy.

As VGV will show, the California Supreme Court has applied Articles XIIIA, XIIIC and XIIID without regard to the restrictions imposed on states by the United States Constitution, has misconceived the purpose of Chapter 9 and has evaded providing answers to the questions this Court posed. There are important federal issues left for this Court to decide.

2. THE CALIFORNIA SUPREME COURT'S RESPONSE TO THE CERTIFIED QUESTIONS - AN OVERVIEW.

The California Supreme Court concludes the State Legislature had enacted, in 1973, well before Proposition 13 was adopted, a statute which *prohibited* local government from levying any tax to pay a judgment which was somehow "founded on contract." Basing its decision (at least as far as VGV was concerned) on this statute, it declines to answer the first certified question regarding the proper construction of Article XIIIA under *state law*. (Slip Opinion, p. 11 to 12.) It then, without first considering the scope and application of Article XIIIA under *state law*, dismisses the federal issues VGV raised because Bankruptcy Court has purportedly provided VGV all the due process and just compensation to

which it was entitled under the United States Constitution. (Slip Opinion, p.13 to 14.)

It then turns its attention to the California Court of Appeal opinion in *F&L Farm Company v. City Council of the City of Lindsay* 65 Cal.App.4th 1345, 77 Cal.Rptr.2d 360 (1998) ("*F&L Farm*"). That case had been decided just a few years earlier. The *F&L Farm* court, applying settled principles of state law, found that Article XIIIA *did not* repeal the pre-Proposition 13 statutes governing the levy of taxes to pay an inverse condemnation judgment. Without disapproving a single one of the state law grounds the *F&L Farm* Court had relied on to reach that conclusion (Slip Opinion, pp. 14 to 15), the California Supreme Court disapproves that case based on its view of federal bankruptcy law. It says the *F&L Farm* Court erred by failing to recognize that Chapter 9 gave the City of Lindsay the *federal right* to discharge and avoid its state law obligation to levy a tax to pay the judgment against it. (Slip Opinion, p. 16.)

Herein lies a contradiction that infects its entire opinion. If the *F&L Farm* Court properly applied *state law* to hold that Article XIIIA *had not* repealed the statutes governing the payment of judgments, then VGV's state law contentions (which the California Supreme Court refused to discuss) had merit. What the California Supreme Court actually suggests by not responding to the first question is that it makes no difference whether state law required either the VGV or the F&L Farm judgments to be paid in full, *because Chapter 9 does not*.

As to the second question, the California Supreme Court agrees that "a port district created pursuant to Harbors

and Navigation Code section 6210 does have *independent* authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order *to raise the funds needed to satisfy a judgment* obtained against it . . ." (Emphasis added) (Slip Opinion, p. 17.) But after that direct answer, it misstates the facts, misreads the statute and coins a new maxim of jurisprudence ("if everything is special then nothing is special") to reach the unsupported conclusion that the property owners within the Ventura Port District ("District") receive no "special benefit" from the continued operation of the Ventura Harbor generally or the Ocean Services Corporation ("OSC") project specifically. (Slip Opinion, p. 20.)

Then, and again without any discussion of the settled state rules of statutory construction, it concludes that Proposition 218, which adopted Articles XIIIC and XIIID in 1997, impliedly repealed the *independent* authority the District had been given by the Legislature to levy assessments under *Harbors and Navigation Code*, section 6365, subdivision (d)(2). (Slip Opinion, pp. 21 to 22.)

By applying these provisions retroactively, without any discussion of their proper scope under principles of state law, the California Supreme Court strongly implies that were it ever forced to answer this Court's first question regarding Article XIIIA, it would hold that Article XIIIA, like Articles XIIIC and XIIID, was intended to prohibit local government from levying any tax to pay any type of judgment imposed by statewide law *unless* two thirds (2/3) of the local electorate vote to approve that levy. But if this is state law, why is the California Supreme Court reluctant to disapprove *F&L Farm* on state law grounds?

3. THIS COURT MUST INDEPENDENTLY DETERMINE THE APPLICABLE FEDERAL LAW AND IT IS NOT REQUIRED TO ACCEPT EVASIVE AND UNSUPPORTED APPLICATIONS OF STATE LAW.

Generally, the federal courts "are bound by the answers of state supreme courts to certified questions just as we are bound by state supreme court interpretations of state law in other contexts." *Reinkemeyer v. Safeco Insurance Company of America* 166 F.3d 982, 986 (9th Cir. 1999). As this Court pointed out in *Reinkemeyer*, two of the recognized exceptions to this general rule are when "state decisions violate federal law or are an obvious subterfuge to evade consideration of a federal issue." *Ibid.* Another recognized exception that is relevant here, is when the state court decision is based on *inaccurate* or *unsupported* facts. *Ward v. Love County Board of Comm'rs,* 253 U.S. 17, 22, 40 S.Ct. 419, 421, 64 L.Ed. 751 (1920). In all cases, "[t]he adequacy of the state law ground to support a judgment precluding litigation of the federal claim *is itself a federal question*." (Emphasis added.) *Howlett v. Rose* (1990) 496 U.S. 356, 365.

A state's highest court's view of *federal law* is never binding on a federal court. A federal court does not "certify the entire constitutional challenge to the state court . . . for certified questions should be confined to uncertain questions of state law." *City of Houston, Texas v. Hill* (1987) 482 U.S. 451. (Blackmun, J. concurring.). There are, however, situations where a state court's erroneous view of federal law, although not binding, may not be subject to review by a

federal court. For example, it has long been settled that the United States Supreme Court "will not review a State court decision resting on an adequate and independent nonfederal ground even though the State court may have also summoned to its support an erroneous view of federal law." *Radio Station WOW v. Johnson*, 326 U.S. 120, 129; 65 S.Ct. 1475, 1480; 89 L.Ed. 2092.

This rule has not been applied to a state court's erroneous views of *federal* law offered in response to a certified question of state law and it should not be. As far as federal law is concerned, this Court is not sitting as an appellate court *vis a vis* the California Supreme Court. The ultimate determination in this case will be the decision of this Court. That decision should correctly reflect this Court's view of federal law wherever it differs from the views expressed in the California Supreme Court's opinion.

Nor does the *Rooker-Feldman* doctrine deny this Court the jurisdiction to review and correct the California Supreme Courts misstatements and misapplications of federal law. That doctrine takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeal v. Feldman*, 460 U.S. 462 (1983). *Rooker* held that federal statutory jurisdiction over direct appeals from state courts lies exclusively in the United States Supreme Court and is beyond the original jurisdiction of the lower federal courts. See 263 U.S. at 415-416. *Feldman* held that this jurisdictional bar extends to federal claims that are "inextricably intertwined" with the state court judgment. See 460 U.S. at 486-487.

The *Rooker* branch of the doctrine precludes the lower

federal courts from considering a federal issue or claim wrongly rejected or erroneously decided by a state court, since only United States Supreme Court has appellate jurisdiction over final state court decisions. But once again, this Court is not sitting as an appellate court *vis a vis* the California Supreme Court. The ultimate determination in this case will be the decision of this Court. That decision should correctly reflect this Court's view of federal law. If it is necessary to correct the California Supreme Court to do that, it must be done.

One aspect of the *Rooker-Feldman* doctrine does merit this Court's consideration in this case. It is settled that the *Rooker-Feldman* doctrine does not apply to preclude consideration of a federal claim if the state court *refused* to consider that claim on its merits. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472-73 (9th Cir.1985), judgment vacated and remanded on other grounds, 477 U.S. 902 (1986). Nor is it applied where the litigants were deprived of a "full and fair opportunity" to litigate their *federal* claims in state court. *United Parcel Service, Inc. v. California Public Utilities Commission* 77 F.3d 1178, 1184 (9th Cir. , 1996). As this Court stresses in *United Parcel Service*, "the Supreme Court's decisions *require* us to *focus* on the *opportunity* granted [litigants] for a full and fair hearing *on the merits* of [their] federal constitutional claim." (Emphasis added.) (*United Parcel Service, supra*, 77 F.3d at 1186.).

For the same reasons, if the California Supreme Court has denied VGV a fair hearing on the merits of its ***state law*** contentions regarding the proper construction of Article XIIIA (as VGV shows below it has), this Court should take that into account in deciding whether the state law grounds upon which

the California Supreme Court purports to rely *vis a vis* VGV are adequate, factually supported and independent. And as already shown, if they are not, they can have no effect on the federal issues remaining to be decided by this Court.

4. THE CALIFORNIA SUPREME COURT FLATLY REFUSES TO CONSIDER THE PROPER SCOPE OF ARTICLE XIIIA AS IT RELATES TO A LOCAL ENTITY'S OBLIGATION TO PAY JUDGMENTS UNDER STATE LAW.

The California Supreme Court begins its discussion of Article XIIIA by knocking a strawman down. It says the OSC judgment cannot qualify as a pre-Proposition "voter approved" indebtedness excepted from limitations imposed by Article XIIIA Section 1. (Slip Opinion, pp.7 to 8.) But no one ever said it could. In fact, it was VGV's position that:

> "Voters do not "approve" judgments. The Legislature does not submit statutes that impose mandatory duties on local government to local voters for their approval. For these reasons, neither the judgment nor the statutes dictating how it must be paid can be characterized as an "indebtedness" *approved by the voters before Proposition 13 was adopted*. VGV has never made such a claim." (Petitioner's Answer to Amici Briefs, Page 1 before the California Supreme Court.)

What VGV suggested before both this Court and the California Supreme Court was that "the obligation to pay a

special property tax the Port District's electors assumed in 1952" was itself a pre-Proposition 13 "voter approved indebtedness." (VGV's Ninth Circuit Appellant's Reply Brief, pp. 7 to 9.) That suggestion was not without support in the California case law. See, e.g., *Patton v. City of Alameda* (1985) 40 Cal.3d 41, *Goodman v. County of Riverside* (1983) 140 Cal.App.3d 900; 190 Cal.Rptr. 7 and *Kern County Water Agency v. Board of Supervisors* (1979) 96 Cal.App.3d 874; 158 Cal.Rptr. 430. The California Supreme Court does not acknowledge this suggested construction or discuss these cases. However, of greater concern, is the California Supreme Court's refusal to consider the *state law* issues that were specifically presented to it regarding the proper construction of Article XIIIA in relationship to the payment of judgments, and other obligations, imposed by either state or federal law on local entities within this state.

The California Supreme Court does not mention, much less discuss, VGV's suggestion that Section 3 of Article XIIIA, not Section 1, governs *state imposed taxes* and that for this reason Section 1's limitations and restrictions can logically apply only to *local* taxes imposed for *local* purposes. Second, although, it has repeatedly held for over 140 years that "voter approval" restrictions contained in the California Constitution's Debt Limit provision *cannot* be applied to avoid payment of *involuntary* debts and liabilities *imposed by law*, it does not discuss VGV's contention that this rule should also be applied to Article XIIIA as well because "[w]here the reason is the same, the rule should be the same." (Civil Code §3511.) Finally, no mention is made of the well settled California rule that there can be no *implied repeal* of a legislative act by an initiative measure. State law demands there be *unequivocal* language expressing the People's intent

to repeal a statute, for otherwise the Judiciary would, in the guise of interpretation, unconstitutionally interfere "with the prerogatives of a coordinate branch of government." *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1217.

Rather than consider and discuss these serious issues of state law, the California Supreme Court invents the idea that someone at some time (and it does not say who or when) gave the District the "discretion" to breach the implied covenant of good faith and fair dealing in its business dealings with OSC. (Slip Opinion, p. 11.) It then concludes that the judgment against the District must be one arising from a "discretionary act" under the Legislature's pre- Proposition statutes. (Slip Opinion, p. 12.) And then deliberately ignores the fact that those statues provide that taxes could be levied yearly at the rate of 10 cents per $100 dollars of assessed value to pay a judgment arising from a so called "*discretionary act*," simply to avoid answering this Court's question as to whether Article XIIIA prohibited these taxes from being levied.

The Court's failure to discuss its own "involuntary indebtedness" rule in connection with its "discretionary act" holding is another example of its efforts to avoid a good faith consideration of the state law issues certified to it. "The standard used in [*Government Code*, section 971] subdivision (a)--which distinguishes between judgments that result from a *discretionary act* and those that do not--is drawn from [the California courts'] *cases interpreting constitutional limits on liabilities or indebtedness* . . ." (emphasis and bracketed material added) 15 *Cal.L.Rev. Comm. Reports* 1257 (1980). It is these cases that give meaning to the "discretionary" v.

"nondiscretionary" standard. To deem the judgment against the District "discretionary" without any discussion of the debt limit cases cannot be explained or justified.

Finally, if the pre-Proposition 13 state statutes were correctly construed and applied by the California Supreme Court to prohibit the District from levying *any* tax to pay *any* judgment *founded on contract*, federal questions still remain as to the constitutionality of those statutes as applied to this particular judgment. (VGV's Ninth Circuit Appellant's Reply Brief, p. 11.) However, the California Supreme Court's statement that the District had discretion to do what it did in this case raises two new federal issues of more immediate concern.

5. THE CONCLUSION THAT THE PORT DISTRICT HAD "DISCRETION" TO "VIOLATE THE IMPLIED COVENANT" CANNOT BE ACCEPTED FOR TWO REASONS.

It was finally determined ten years ago that the District did *not* have *discretion* "to disavow responsibility for the covenant-related losses, change the terms of the lease, issue default notices in bad faith, [and] blight the project with a sand berm." (*Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, 1781; 19 Cal.Rptr.2d 750.) As the Court of Appeal held then "[a]ny other construction would be tantamount to a "license to steal" and absolve the District "from liability for conduct which would make the very contract itself and the security mentioned therein wholly valueless." (*Ocean Services Corp. v. Ventura Port District*, *supra*, 15 Cal.App.4th at 1781.) The Seventh Amendment to

the United States Constitution was adopted to prohibit reexamination of facts that had been settled by a previous jury. *United States v. Wonson,* (1812) 28 F.Cas. 745, 750 (No. 16,750). For the California Supreme Court to reverse that finding ten years later is unprecedented.

Second, the California Supreme Court's construction of the term "discretionary act" itself violates the Fifth and Fourteenth Amendments to the United States Constitution. In 1860, (well before the Fifth Amendment's Taking Clause applied to the states under the Fourteenth Amendment), the California Supreme Court held that local government "*cannot appropriate to [its] own use the property of others, and screen [itself] from responsibility upon any pretense of excessive indebtedness*." *McCracken v. City of San Francisco* (1860) 16 Cal. 59, 631-632. This was the foundation for the "involuntary indebtedness" exception to the "voter approval" required under the California Constitution's debt limit provision. As it explained not long ago "[w]e have long held that the debt limitation in section 18 *only* applies to discretionary debt, not to obligations imposed by law." *Rider v. City of San Diego* (1998) 18 Cal.4th 1038, 1045; 959 P.2d 347, 353; 77 Cal.Rptr.3d 189, 195. Until now, the California Supreme Court has never wavered from that *state* rule. As a result, there has never been an occasion for any court to consider the federal implications of its newly minted definition of a "discretionary act".

The California Supreme Court has also repeatedly and uniformly held that neither state nor local government has *discretion* to breach a contract. See, e.g. , *Souza and McCue Constr. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510-511; 20 Cal.Rptr. 634; 370 P.2d 338; *E. H. Morrill Co. v.*

State of California (1967) 65 Cal.2d 787, 793; 56 Cal.Rptr. 479; 423 P.2d 551. To reach its "discretionary act" finding the California Supreme Court also ignores the fact that not even Congress, which has the constitutional right to impair contracts, can exercise that right to reduce its own contractual obligations (without payment of just compensation) if to do so would force "some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole." *United States v. Winstar Corp.* (1996) 518 U.S. 839, 883; 135 L.Ed 2d 964; 116 S.Ct. 2432. citing *Dolan v. City of Tigard*, 512 U.S. 374, 384; 129 L.Ed 2d 304; 114 S.Ct. 2309 (quoting *Armstrong v. United States*, 364 U.S. 40, 49; 4 L.Ed 2d 1554; 80 S.Ct. 1563 (1960)).

In disregard of these well settled principles, the California Supreme Court announces that the District had *discretion* to breach the implied covenant in its dealings with OSC and assumes, without discussion, the Legislature can by statute authorize local government to pay less than the amount a jury awarded for that breach merely because the judgment happens to be "founded" on contract. The practical result of its "discretionary act" finding is to endorse, if not advocate, the repudiation of contracts and the uncompensated taking of private property for public use as acceptable means to increase local government revenues in California. This Court should make it abundantly clear that the Fifth and Fourteenth Amendments to the United States Constitution do not permit the taking of private property in manner.

6. THE CALIFORNIA SUPREME COURT'S OPINIONS AS TO FEDERAL LAW IN GENERAL AND THE BANKRUPTCY CODE IN PARTICULAR MERIT CAREFUL CONSIDERATION.

After it declines to discuss the *state law issues* VGV raised as to the proper construction of Article XIIIA, the California Supreme Court does an about-face when it comes to discussing the *federal issues* VGV raised regarding the application of Article XIIIA to the facts of this case. It brands VGV's due process argument as "make weight" and says "[i]ronically, in the name of due process, VGV would deny districts the protections afforded them under Chapter 9 of the Bankruptcy Code." (Slip Opinion, p. 13.) It rejects VGV's republican form of government argument claiming that it had already rejected this same argument in *Amador Valley Joint Union H.S. Dist. v. State Board of Equalization* (1978) 22 Cal.3d 208, 149 Cal.Rptr. 239 when the fact is, *Amador* involved *local* taxes for *local* purposes and did not come close to considering or addressing the concerns VGV raised in the case at bar as to obligations imposed by state or federal law. (Slip Opinion, p.12.) Finally, again embracing the Bankruptcy Code, the California Supreme Court rejects VGV's federal "taking" argument asserting that the "discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment . . ." (Slip Opinion, p. 14.)

In short, the California Supreme Court says it need not consider the question put to it as to the proper construction of Article XIIIA under *state law* (although it clearly needed to do this). It then offers its views on "due process" and "just

compensation" under federal bankruptcy law (although it was not asked and did not need to do this) to reject the ***federal issues*** VGV raised as to the application of Article XIIIA. It then disapproves *F&L Farm Company v. City Council of the City of Lindsay* (1998) 65 Cal.App.4th 1345, 77 Cal.Rptr.2d 360 not because the *F&L Farm* court erred in its application of ***state law*** but because it had failed to understand that Chapter 9 gave the City of Lindsay the ***federal right*** to avoid its state obligation to levy taxes to pay that judgment. (Slip Opinion, pp. 15 to 16.)

The California Supreme Court's application of Chapter 9 to the facts of this case raises new federal issues this Court needs to consider.

7. THE CALIFORNIA SUPREME COURT HAS ERRED IN ITS APPLICATION OF CHAPTER 9 TO THE FACTS OF THIS CASE.

It is undisputed that the People gave the Board of Port Commissioners the discretion and authority to contract with OSC for the construction of the Harbor Village, as long as the necessary funds were raised ***by some means other than taxes***. It is beyond dispute that OSC completed the project without one penny of property tax dollars. It is also undisputed that had it not been evicted in bad faith in 1987, shortly after it had completed this $23 million dollar project, OSC would still be enjoying the fruits of its 50-year lease today. It is also undisputed that as a result of the District's "deliberate" breach of the implied covenant, the District acquired OSC's leasehold and a unanimous jury in 1991 awarded OSC compensation for that wrongful taking. The Bankruptcy

Court did not take exception with the fact that the "just compensation" to which OSC was entitled for the "taking" of its leasehold was determined by a unanimous state court jury in 1991. Nor did the Bankruptcy Court, in this specific case, suggest that the District's payment of $7.7 million dollars in 1998 was "just compensation" for the taking of VGV's $15.6 million dollar leasehold equity in 1987.

Until the California Supreme Court's decision in this case, everyone agreed that the Fifth and Fourteenth Amendments prohibit a state's electorate, its executive branch, its legislature and its judiciary from forcing a private party "to bear public burdens which, in all fairness, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed 2d 1554, 80 S.Ct. 1563 (1960).

First, the Bankruptcy Court's order in this particular case ***did not*** discharge the District' debt. That order establishes that if taxes can be levied to pay the judgment, until those taxes are levied, and OSC is paid, OSC ***has not*** received the "just compensation" to which it is entitled under the United States Constitution. The California Supreme Court ignores these facts to say that "[t]he discharge of the District's debts in a bankruptcy proceeding cannot reasonably be construed as a taking in violation of the Fifth Amendment to the United State's Constitution." (Slip Opinion, p. 14.)

The California Supreme Court has also chosen to ignore the reason behind Chapter 9. Congress adopted Chapter 9 to provide relief when severe national economic contractions caused what has been called a "death spiral" for local governmental entities. As more and more local taxpayers were unable to pay the taxes levied on their

properties, local government's tax base shrunk dramatically and its loss of tax revenue accelerated as it became the owner of more and more tax defaulted properties to the point where Congress had to act. The California Supreme Court once knew that neither the state courts nor the state legislatures could provide any relief in such circumstances without violating "the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation." *Peoples State Bank v. Imperial Irr. Dist. et al.* (1940) 15 Cal.2d 397, 401.

The fact of the matter is that if states could prohibit the levy of taxes for the payment of contractual debts and obligations during tough economic times, *there would be no need for Chapter 9*. By ignoring history and the United States Constitution, the California Supreme Court arrives at a most remarkable conclusion. Propositions 13 and 218 in tandem with Chapter 9 permit California local governmental entities to renege on contractual debts and obligations *during prosperous times*. Chapter 9 was created to provide local government relief when the tax burden became confiscatory and its taxpayers could no longer bear that burden. Chapter 9 was not created and cannot be used to deny a private party payment of a just debt which the taxpayers can, but simply do not want to pay.

8. THE LANDOWNERS IN THE DISTRICT CONTINUE TO RECEIVE A SPECIAL BENEFIT FROM THE CONTINUED OPERATION OF THE VENTURE HARBOR.

As to the issue of assessments under *Harbors and*

Navigation Code § 6365, subdivision (d) to satisfy "liabilities arising from projects" this Court must accept the California Supreme Court's holding that "[g]enerally speaking, a port district created pursuant to Harbors and Navigation Code section 6210 does have *independent* authority to impose assessments under Harbors and Navigation Code section 6365, subdivision (d)(2) in order to raise the funds needed to satisfy a judgment obtained against it . . ." (Emphasis added.) (Opinion, p. 17.) It is not required to accept the California Supreme Court's finding that there was "no special benefit."

The California Supreme Court says that "because of the failure of" the project "there is no means of fixing an assessment valuation per acre for each parcel in proportion to the benefits to be derived from the "continuance in operation" of the project *as required* by *Water Code* section 51323." (emphasis added) (Opinion, p. 20.) There is no legal or factual support for this statement.

Since the District "evicted Ocean from the property and took control of the marina facilities" in 1987 *all revenues* generated by OSC's Harbor Village have gone to fund the District's operations and provide public services the District's constituents desire. The public continues to receive substantial revenue, approximately $2.5 million dollars each year, from the OSC project. Second, the Board of Port Commissioners is not *required* by *Water Code*, section 51323 to apportion the needed assessment based on acreage.

As with the public park in *Knox v. City of Orlando*, 4 Cal.4th 132, 14 Cal.Rptr.2d 159 (1992), the continued operation of an improvement like the Harbor Village

maintains the overall property values in the community. Although, some property values benefit more than others, all within the District receive a special benefit from the Ventura Harbor. In addition, the Harbor Village, unlike the public park in *Knox*, continues to contribute significant revenue each year to fund the District's operation. In this context, the California Supreme Court's statement that "if every thing is special than nothing is special" does not answer anything. Since, the District was formed to include only those properties that would be specially, i.e., directly, benefitted by the creation and the continued operation of the Ventura Harbor, logic dictates that here everything is benefitted and nothing is not benefitted.

It is equally clear that it is far more reasonable to apportion the special benefits bestowed by the Harbor Village amongst the property within the District based on property values rather than acreage. This is undoubtedly why *Harbors and Navigation Code* §6365 subdivision (h) grants the Board of Port Commissioners discretion to *apportion* the assessment on any "reasonable basis" amongst the landowners in the District.

The California Supreme Court's finding that a special benefit was lacking here is not supported by the facts of this case and should be disregarded for this reason. It should also be disregarded because where, as here, the liability to be satisfied arises from the taking of private property for public use: "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725 (1910).

9. ARTICLES XIIIC AND XIIID ARE SUBJECT TO THE SAME CONSTITUTIONAL OBJECTIONS VGV RAISED AS TO THE APPLICATION OF ARTICLE XIIIA.

This Court did not inquire (as it did with Article XIIIA) whether either Article XIIIC or Article XIIID adopted as Proposition 218 in 1997 prohibited the District from levying the taxes mandated by *Harbors and Navigation Code* § 6361. Nor did it make such an inquiry as to the assessments allowed by *Harbors and Navigation Code* § 6365, subdivision (d) to satisfy "liabilities arising from projects." The California Supreme Court applies these 1997 provisions *retroactively* to support its "no special benefit" finding. (Slip Opinion, p. 19.) It also implies that if Article XIIIA was not clear, these new provisions now make it clear that in California "just compensation" need not be paid when private property is taken for public use unless there was "taxpayer consent." (Slip Opinion, p. 21.) This raises additional federal concerns.

Like Article XIIIA, these provisions are all readily susceptible to a narrow construction under the California Supreme Court's previously articulated "involuntary indebtedness" rule. Voter approval only applies "to discretionary debt, not to obligations imposed by law," *Rider v. City of San Diego* (1998) 18 Cal.4th 1038, 1045. If state law does not limit the scope of Articles XIIIC and XIIID to discretionary *local* debt for *local* purposes and instead extended their voter approval requirements to taxes and assessments to pay mandatory obligations imposed by law, the same federal concerns VGV raised under the Guarantee

Clause, the Taking Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment as to Article XIIIA may need to be answered as to these Articles. If there is any possibility that it would be proper to apply these provisions retroactively to payment of the OSC judgment, these issues should be addressed now not later.

10. CONCLUSION.

The California Supreme Court says that it should come as *no surprise* to VGV or *anyone else* that once Proposition 13 was adopted, the days when a district could expect a county "to levy taxes to raise whatever sum the district budget calls for . . . *are long gone*." (Emphasis added.) (Slip Opinion, p. 9.) But the question it was asked, was whether Proposition 13 had brought an end to the days when a private party could expect a county to levy taxes to pay a judgment like the one in this case *without the approval of the local district's taxpayers*. Had the answer to that question been yes, VGV's concerns under the Guarantee Clause would move to center stage. Then, this Court would need to consider, is it constitutionally permissible for a state to give local residents the power to decide whether or not taxes will be levied to pay a liability imposed by state or federal law on a local governmental entity?

Surely, the California Supreme Court does not genuinely believe that the Legislature had decided, well before Proposition 13 was enacted, that in California under no circumstance could taxes ever be levied to pay any judgment "founded on contract." If that is what it believed, it would have said: it should come as no surprise to VGV or anyone else that the Legislature had decided that taxes could never be

levied *to pay judgments founded on contract*. And even were this true, which the statutes make clear it is not, it would eliminate only the Guarantee Clause issue. Federal questions still remain as to whether the state Legislature can do this without violating the United States Constitution's Contract Clause as well as its Fifth and Fourteenth Amendments.

The California Supreme Court purports to render those issues moot by holding that Congress, by adopting Chapter 9, precluded both the state and federal courts from considering a person's rights under both the California and United States Constitutions. The bottom line and only consistent theme that runs throughout the California Supreme Court's opinion in this case is that since VGV got something on the judgment in the bankruptcy court this Court should refuse to consider any of the *federal* constitutional issues VGV raised as to the permissible scope of Article XIIIA, XIIIC and XIIID. VGV is confident that this Court will not agree and will consider the issues VGV has raised on their merits.

A system of state government where local property owners can refuse to pay taxes and assessments needed to pay a judgment awarding compensation for the wrongful taking of private property and the persons wronged can recover the compensation to which they are entitle , if at all, only in a proceeding under Chapter 9 cannot be allowed to exist in this country. In a Chapter 9 proceeding, the bankruptcy judge has no power to order a local entity to levy taxes or reduce its public expenditures to pay a judgment. (11 U.S.C. § 904.) In California, if the bankruptcy court is the court of last resort, a judgment creditor is denied due process and will in the end, as the Defendants' insist should happen here, be forced to bear a public burden the public can and

should bear. This result is clearly prohibited by the United States Constitution for a number of reasons.

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Respectfully submitted,
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